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NORTH CAROLINA REPORTS.

VOL. 61.

CASES AT LAW

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA.

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DURING THE PERIOD COMPRISED IN THIS VOLUME.

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Hon. William H. Battle. Hon. Edwin G. Reade.

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Hon. Edward J. Warren,
*Hon. Daniel G. Fowle,
Hon. Robert B. Gilliam,
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Hon. Anderson Mitchell,
Hon. William M. Shipp,
†Hon. Augustus S. Merrimon,
Hon. Alexander Little,
Hon. Clinton A. Cilley.

* Judge Fowle resigned November, 1867, and was succeeded by Judge Cilley.
† Judge Merrimon resigned August, 1867, and was succeeded by Judge Little.

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Hon. Oliver P. Meares, Wilmington.
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ATTORNEY-GENERAL:
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108033

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Joseph W. McNutt	Yadkin County.
William A. Guthrie	Orange County.
Thomas J. Hadley	Wilson County.
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John W. Dunham	Wilson County.
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Milton C. Richardson	Johnston County.
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Thomas S. Galloway	Rockingham County.
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James J. Osborne	Henderson County.
Richard M. Nelson	Wayne County.
Benjamin H. Bunn	Nash County.
Armistead Burwell	Mecklenburg County.
Thomas T. Allen	Bertie County.
Dillard L. Love	Jackson County.
Kerr Craige	Rowan County.
James A. Graham	Orange County.
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John R. Henderson	Rowan County.
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E. Tyler Branch	Halifax County.
Spier Whitaker	Halifax County.
Charles W. Broadfoot	Cumberland County.
William Val Sevier	Polk County.
Willis Badley	Perquimans County.
James C. Dobbin	Cumberland County.
John R. Winston	Rockingham County.
John W. Hinsdale	Cumberland County.
Daniel L. Russell, Jr	Brunswick County.

June Term. 1866.

The Following were Granted License to Practice in the

SUPERIOR COURTS

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James C. Gilmer	Surry County.
J. Cassius L. Gudger	Haywood County.
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John J. Lansdell	Granville County.
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James D. McIver	Moore County.
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Richard C. Badger	Wake County.

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CASES AT LAW

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA.

AT RALEIGH.

JUNE TERM, 1866.

Doe on the demise of WILLIAM H. BRANCH and others v. JAMES HUNTER and wife.

1. Where a testator devised, to A, his "plantation between Burnt Coat and Beaverdam swamp," to B, "all that portion of his Enfield tract of land lying north of the old road from Old Enfield to Halifax town," to others, "all the balance of his property, after paying debts," and afterwards cancelled the devise to A: *Held*, that although the description of the land given to B, would, *per se*, include that given to A, yet, inasmuch as when first written, the testator did not use it in this large sense, such sense could not be imposed upon it by the mere cancellation of the devise to A: *Held also*, that the legal effect of such cancellation was to throw the land given to A, into the residue.
2. Evidence, to show that a tract of land of a particular description, in a will, includes another tract having another description in such will, is competent.

(The case *President and Directors*, etc., *v. Norwood*, 45, 65, cited and approved.)

EJECTMENT, tried before *Saunders, J.*, at Fall Term, 1864, of Halifax Superior Court.

The plaintiff claimed title under the will of John Branch, deceased; the tract in question being that described in the second clause, as follows: "Then I give to my daughter, Martha E. Bradford, the following negroes, viz., etc., *also my plantation between Burnt* *coat and Beaverdam swamp.*" The words in (2) italics were afterwards erased, and cancelled by the testator, who made a memorandum thereof, at the foot of the will, in his own handwriting. Upon the probate of the will the cancelled words were rejected by the Court as part of the will, and the rest admitted to probate.

The defendant claimed title to the land, under the following clause of the same will: "Then I give to my executors, in trust for the benefit of my daughter, Sally Hunter, etc., all that portion of my Enfield tract of land lying north of the old road leading from Old Enfield to Halifax town, together with," etc.; and offered evidence tending to show that the Enfield tract of land embraced the land in controversy. This evidence was objected to by the plaintiff, and rejected by the Court.

The Court charged the jury that, although the clause devising to the executors in trust, etc., might have included the land in controversy, if there had been in the will, as originally written, no clause devising it to Mrs. Bradford, yet, that inasmuch as the land was not devised to the trustees before the cancellation, the will could not, after that, operate to convey the land. The defendant excepted. Verdict and judgment for the plaintiff. Appeal by the defendant.

Bragg and *Batchelor*, for the plaintiff.
Moore and *Conigland*, for the defendants.

PEARSON, C. J. His Honor erred in rejecting the evidence tending to show that the Enfield tract of land embraced the land in controversy. See *Deaf and Dumb Institute* v. *Norwood*, 45 N. C., 65.

For this reason, in considering the other question, it is to be assumed that the land in controversy was considered and treated by the testator, in his lifetime, as a part of the Enfield tract of land.

We have then this case: The testator devises a (3) part of the Enfield tract of land to his daughter, Mrs. Bradford, by these words: "also my plantation between Burnt coat and Beaverdam swamp." He then devises to his daughter, Mrs. Hunter, "all that portion of my Enfield tract of land lying north of the old road from Old Enfield to Halifax town." (We must bear in mind that the land devised to Mrs. Bradford also lies north of this old road, and in the view which we are now taking, is embraced by this general description.) The testator then gives "all the balance of my property, after paying debts," to the lessors of the plaintiff. Finally, he cancels the devise to Mrs. Bradford.

The question is: Does this act of cancellation have the effect of throwing the plantation which had been devised to Mrs. Bradford into the devise to Mrs. Hunter, or of letting it fall into the residuary clause?

We are of the opinion that it falls into the residue. The devise to Mrs. Bradford shows that, by the devise to Mrs. Hunter, under the general description "all that portion of my Enfield tract of land lying north of the old road," he did not include the part lying north of the Burnt coat swamp. The act of cancelling the devise to Mrs. Bradford is satisfied, by giving to it the effect of defeating the devise in respect to her; and we can see no good ground for giving to it the additional effect of enlarging the sense of the words of general description, used in the devise to Mrs. Hunter. If this be so, it follows that the land which he intended at first to give Mrs. Bradford, and which is excepted out of the devise to Mrs. Hunter, is, by the cancellation of the devise to the former, left undisposed of, except by the residuary clause. The question may be stated thus: The testator gave to Mrs. Hunter his Enfield tract of land, except the part lying north of the Burnt coat swamp. That part he afterwards gave to Mrs. Bradford. He then cancelled the devise to Mrs. Bradford, but did not cancel the *exception in the devise to Mrs. Hunter.*
(4) There being nothing then to show an intention to alter the latter, the words must retain the sense in which he used them at first, unless we give to the act of cancellation the effect of not only defeating

the devise to Mrs. Bradford, but also of adding to the devise to Mrs. Hunter, in the absence of anything to show this second or superadded intention.

If he had intended to enlarge the devise to Mrs. Hunter, by adding to it a plantation of 500 acres of land, he would have taken the trouble to alter his will by saying so, and his being content with the simple act of cancellation, shows that his purpose was merely to revoke the devise to Mrs. Bradford—and the legal effect of his doing so is to throw the land into the residue.

There is no error.

PER CURIAM. Judgment affirmed.

Cited: Horton v. *Lee*, 99 N. C., 227.

JOHN HUGHES *v.* PHILIP PIPKIN.

1. One who has precedence in a claim for letters of administration loses such right, not by delay merely, but by unreasonable delay, which is a matter of law.
2. Letters of administration having at the first term of the court been granted to one not primarily entitled, upon application at the next term by the person primarily entitled, and upon his showing cause for not having applied before: *Held*, that it was the duty of the court to set aside the former letters, and to issue letters to the second applicant.

(The cases, *Stoker v. Kendall*, 44 N. C., 242, and *Wallis v. Wallis*, 60 N. C., 78, cited and approved.)

THIS was an appeal from an order by *Warren, J.*, at Spring Term, 1866, of the Superior Court for Craven County, made in a contest for administration upon the estate of one Raymond Castrix, deceased.

(5) The facts were, that at December Term, 1865, of Craven County Court, letters of administration upon that estate were granted to the defendant, and he was duly qualified. At March Term, 1866, in

pursuance of a notice thereof, theretofore served upon the defendant, an application was made to set aside the former appointment, and to issue letters to the plaintiff, the appointee of the next of kin, who resided at Goldsboro. In support of that application, it was shown that the next of kin had addressed a note to the plaintiff, during the week of December Term, 1865, requesting him to take out letters; and had delivered the same to a gentleman of Newbern, going home, with a request that he would transmit the same promptly, as it contained matter of importance; and that such note was not delivered until the close of the term, owing to the illness of the carrier. Thereupon the previous order was set aside, and the plaintiff appointed administrator.

Upon an appeal by the defendant to the Superior Court, additional reasons were shown for his appointment, arising from his pecuniary liabilities for the deceased, etc., and it was also insisted by the defendant that the Court had no power to reverse the former appointment in the County Court. His Honor having given judgment for the defendant, the plaintiff appealed.

Haywood, for the plaintiff.
Manly and *Haughton*, for the defendant.

READE, J. The statute (Rev. Code, chap. 46, secs. 2, 3), prescribes who are entitled to letters of administration; and these, in the order mentioned, have a right to administer. So that, if the persons named apply for letters at the proper time, they are entitled as a matter of right, unless they are "incompetent." The Court has no discretion, except what is given in the statute.

An appeal in these matters lies from the County (6) to the Superior Court, and thence to the Supreme Court. But the Appellate Court has no more discretion than the County Court, and can determine only the rights of the parties, and issue a *procedendo* to the County Court.

If the person having precedence under the statute does not apply, then the next in order has the right to obtain letters. But, suppose that the person having precedence under the statute delays to apply, and that the next in order applies for and obtains them, and then that, at a subsequent term of the court, the person who originally had precedence applies to have such letters revoked, and others granted to him, what must the Court do?

It is settled in the cases of *Stoker* v. *Kendall*, 44 N. C., 242, and *Wallis* v. *Wallis*, 60 N. C., 78, that the person having precedence loses his right, not by delay, but by *unreasonable delay*. What delay will amount to this, is a question for the Court.

Let us apply the foregoing principles to the case before us: The plaintiff, as appointee of the next of kin, had precedence; but, because of the miscarriage of a letter, did not make application at December Term, 1865, the first term at which it was proper to apply. The defendant, who was next in order, did, without notice to the plaintiff, apply at that term, and obtained letters of administration. Afterwards, the plaintiff gave the defendant notice that he would apply, at the next term, to have these letters revoked. At such term they were revoked, and letters were thereupon granted to the plaintiff. The defendant appealed from this order to the Superior Court, and his Honor "reversed the decision of the County Court, rendered at March Term, 1866, and affirmed the previous appointment of the defendant, at December Term, 1865."

In this we think that there was error. We are of opinion that the delay to apply at December (7) Term was not, under all the circumstances, unreasonable; and therefore, that the plaintiff had not forfeited the right which he originally had. If the defendant had given notice to the plaintiff of his purpose to apply at December Term, and thereupon the plaintiff had failed to apply, he would have lost his right, and the defendant would have been entitled to letters, and the Court consequently would have had no power thereafter to revoke them.

This opinion must be certified to the Superior Court, with instructions to issue a *procedendo* to the County Court to appoint the plaintiff.

Cited: Williams v. *Neville,* 108 N. C., 562.

HORACE M. BARRY v. JAMES SINCLAIR.

A bond payable to the plaintiff in an attachment, and conditioned for the appearance of the defendant, etc., is not a "bail bond," within the meaning of the Rev. Code, c. 7, s. 5, and, therefore, by executing such bond, the defendant does not obtain a right to replevy and plead.

ORIGINAL ATTACHMENT, from an order in which, by *Buxton, J.*, at Spring Term, 1866, of New Hanover Superior Court (the return term), the defendant appealed.

The facts appear sufficiently in the opinion of the Court.

No counsel in this court for the plaintiff.
Leitch, for the defendant.

READE, J. The plaintiff sued out an original attachment, and it was levied by the sheriff on the property of the defendant. The defendant replevied the property by giving to the sheriff a bond payable to the plaintiff, conditioned for the appearance of the defendant at the next court, to answer the plaintiff's action. At (8) the return term the defendant appeared, and offered to plead. The plaintiff objected, that the defendant had not given a bond as required by the statute, and therefore could not plead. The Court held that the bond was sufficient, and overruled the plaintiff's objection.

The fifth section of chapter 7 of the Revised Code authorizes the defendant to replevy, by giving to the sheriff a "bail bond." It is true that it does not prescribe that the bond shall be payable to the sheriff, but it does prescribe a "bail bond." This, as is well settled, must be payable to the sheriff; for, originally, it was for his indemnity alone; although, afterwards, it was allowed to be assigned to the plaintiff for his indemnity, and, by later legislation, to enure to the benefit of the latter, even without an assignment. See Rev. Code, chap. 11, sec. 2, which gives to the plaintiff a summary remedy thereupon by *scire facias*.

The bond here may be good as a bond at common law, but it is not such an one as the statute requires; and, therefore, the specific remedy upon it is not that to which the plaintiff would be entitled if it were such, i. e., a bail bond.

We observe that the bond filed in this case is modelled upon that prescribed by Mr. Eaton, in his "Forms," a book of great accuracy, and in very general use. We suppose that his Honor's opinion may have been founded upon that authority. The explanation is, that the phraseology of the statute under consideration has been altered since that work was published.

There is error. This opinion will be certified to the Court below.

PER CURIAM. Exception sustained.

(9)

P. L. FERRELL v. HILLIARD BOYKIN.

1. An illegiitimate free negro child, who has not gained a new settlement by a year's residence in some other county, is, for the purpose of being apprenticed, subject to the jurisdiction of the court of that county in which its mother was settled at the time of its birth.
2. A master may recover damages of any one who, after demand made, detains an apprentice.

(The case of *Prue v. Hight*, 51 N. C., 265, cited and approved.)

TRESPASS ON THE CASE, tried before *Shepherd, J.*, at Fall Term, 1859, of Nash Superior Court.

The facts were, that at November Term, 1857, the County Court of Nash County bound a base-born free negro child as an apprentice to the plaintiff. The child had been born in Nash County, and had lived there with his mother until December, 1856, when he removed with his mother to the county of Wilson, where he continued to reside until the time of the trial. In June, 1857, soon after his mother's death, the child had been bound by his mother's husband, who was also his reputed father, to the defendant, Boykin.

Upon a demand being made by the plaintiff, the defendant refused to deliver up the child, and therefore this suit was brought.

At the trial, the defendant insisted that the plaintiff could not recover, either because the indenture to himself was valid, or because the order made by Nash County Court was void.

The court directed the jury to find a verdict for the plaintiff, reserving the questions of law. Afterwards, being of opinion with the defendant upon the question of the jurisdiction of the County Court of Nash, the Court ordered the verdict to be set aside and a nonsuit entered.

Whereupon the plaintiff appealed.

Batchelor, for the plaintiff.
Moore, for the defendant.

READE, J. It is plain law that an illegitimate (10) child receives the settlement which its mother had at the time of its birth; and that such settlement continues until a new one is acquired. By the Revised Code, chap 86, sec. 12, a new settlement is gained by a continuous residence in another county for one year, at least.

County Courts being required (Rev. Code, chap. 5, sec. 1), to bind out "all base-born colored children" within their respective jurisdictions, it was not only the right, but the duty of the County Court of Nash County to bind out the boy, who is the subject of the present controversy. His residence in Wilson County, being for less than a year, had given him no settlement there, and, of course, his original settlement remained.

In the course of the argument here, it was said that the County Court of Nash ought not to have assumed jurisdiction over the boy, unless that of Wilson had returned him thither, as a pauper. The answer to this is, that it is the duty of the court to bind out all free base-born colored children, whether they are paupers or not! At least such was the law at the time of this transaction. It was assumed by the Legislature that children in their condition would be neglected, and so the courts were directed to bind out all of that class. In the present case, the County Court of Nash County, being responsible for the proper nurture of the boy, was not to wait until he became a vagabond, and had been cast back upon it as a pauper, by the county of Wilson; but it was its duty at once to exercise its legitimate control, and bind him as an apprentice. Prue v. Hight, 51 N. C., 265.

The plaintiff, being master of the boy, had a right to his services; and the defendant, having employed him, and then detained him from the plaintiff after a demand, is liable for the value of his services.

The judgment rendered in the court below must be reversed, and judgment given here for the plaintiff, in accordance with the verdict.

PER CURIAM. Judgment reversed.

Cited: State v. *Elam*, *post*, 464.

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(11)

THE STATE v. S. BLAGGE and JOHN E. SOPER.

Under the ordinance of the 18th of October, 1865, concerning Revenue, a provisional sheriff, who has not given bond as required thereby, is not authorized to demand of merchants an account of their purchases, and of the taxes due from them.

MISDEMEANOR, in not rendering an account of their business, etc., as required by the ordinance of the 18th of October, 1865, concerning Revenue, etc., tried before *Warren, J.*, at Spring Term, 1866, of Craven Superior Court.

The defendants were merchants who had done business in Newbern as partners, from 1863 to 1866, and in January, 1866, they refused to render any statement of their business during 1865, to one Harper, who demanded the same as Sheriff of Craven. It appeared that Harper was provisional sheriff, and had given bond as such at the time of his appointment, in July, 1865, but had not executed a bond as required by the ordinance.

Other questions were raised as to the power of the State to impose these taxes upon merchants who did business throughout 1865, in Newbern, but the opinion of the court renders it unnecessary to state the facts in connection with this matter.

The court below charged the jury that, if they believed the evidence, the defendants were guilty. There was a verdict of guilty and judgment accordingly, from which the defendants prayed an appeal.

The *Atto. Gen.*, also *Phillips* and *Battle*, for the State.
Manly and *Haughton*, for the defendants.

READE, J. There were several interesting and important questions very ably discussed in this case. But it is unnecessary, and so would be improper, to (12) decide them, because it appears that, assuming every other question to be in favor of the State, the person who demanded the tax list from the defendants was not authorized to do so, and, therefore, of course, it was not a crime in them to refuse.

The ordinance of the Convention, entitled "An Ordinance to Provide Revenue for the Year 1865," ratified the 18th of October, 1865, provides (sec. 23) that the provisional sheriffs shall assemble the magistrates of their respective counties, and enter into bonds, and "thereupon such sheriffs are empowered to collect the taxes imposed by this ordinance": *Provided*, that if such persons referred to as acting sheriffs refuse or decline to enter into the bonds required, then, and in that event, the justices may appoint other persons," etc. It is evident that the Convention did not mean to entrust the provisional sheriffs with the collection of the taxes, unless they gave new bonds. The provisional sheriff in this case did not enter into a new bond as required, and, therefore, he had no right to take tax lists or to collect the taxes.

It is true that the General Assembly, on the 1st of March, 1866 (chap. 19, sec. 1, Acts of 1865-'66), enacted that those who were sheriffs at the ratification of that act should collect the taxes under the ordinance, in those counties where the provisional sheriffs had not renewed their bonds. But that does not affect this case, because the refusal of the defendants, for which they are indicted, took place in the January preceding the passage of the act.

His Honor charged the jury that, if they believed the evidence, the defendants were guilty. In this there was error. And for that error there must be a *venire de novo*.

PER CURIAM. *Venire de novo.*

(13)

P. EAGIN and COMPANY v. SAMUEL MUSGROVE.

An entry of the words "settled and dismissed, costs paid into office, received tax fee, J. L. H. Att'y," made by a plaintiff upon the appearance docket, before the return term of the writ, does not amount to a *retraxit;* and an order at the return term, to strike it out, is proper.

REPLEVIN, before *Buxton, J.*, at Spring Term, 1866, of the Superior Court for New Hanover County.

The facts are sufficiently stated in the opinion of the Court.

No counsel in this court for the plaintiff.
Person, for the defendant.

READE, J. The plaintiff sued out a writ of replevin for a flat boat, which was executed, and the defendant failing to give bond, the boat was delivered to the plaintiff.

Before the return term, the plaintiff caused to be entered on the appearance docket the following: "Settled and dismissed; costs paid in office; received tax fee; J. L. H., Attorney."

At the appearance term, the defendant moved for judgment against the plaintiff, on the bond executed at the time of suing out the writ, upon the ground that the aforesaid entry was a *retraxit.*

The plaintiff asked leave to strike out the aforesaid entry, as having been inconsiderately and unadvisedly made, and his Honor allowed it to be stricken out.

The defendant, supposing that his Honor had no power to allow the entry to be stricken out, prayed for an appeal, which was granted.

A *retraxit* is "when the trial is called on, by a plaintiff's coming *in person* into court and saying that he will not proceed in it." 2 Sellon's Practice, 46. "A *retraxit* can not be entered before the plaintiff hath declared, and if entered before, it hath but the (14) effect of a nonsuit." 7 Bac. Ab., "Nonsuit," 215. "Where a plaintiff is demanded, and doth not appear, he is said to be nonsuited." *Ibid.*

It is well settled that a court has full power over its records during the term, to strike out, alter or amend. So that, if the entry had been made in court, and with the sanction or, as the judgment of the court, it was competent for the Court to order it to be stricken out. But, in fact, the entry was not made in court, nor during the term of the court. Nor had it any time the sanction of the court. It was an entry upon the docket in vacation, which neither the plaintiff nor anyone else had the right to make. And, therefore, it was not only within the power, but it was the duty of the court to strike it from the records. It is true that the entry being there, the court might, upon application of the plaintiff, have given its sanction to it; and then it could have been regular.

It may be proper to remark that the entry has neither the form nor substance of a *retraxit*. A *retraxit* is a "renunciation" of his suit by the plaintiff. The entry here is that it was "settled," which implies that it was settled by the parties. That being so, we find the defendant coming into court, and refusing to abide by the settlement, and moving for judgment against the plaintiff. It was manifestly just, therefore, that the court should allow the note or memorandum of the settlement, which the defendant had repudiated to be stricken from the records.

PER CURIAM. Judgment affirmed.

Cited: Simmons v. *Simmons*, 62 N. C., 65.

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(15)

Doe on the demise of the heirs of DANIEL THOMPSON v. MARY MATTHEWS.

Evidence that one in possession of a tract of land declared that he held it as tenant of a certain person, is admissible, even although it be shown that such tenancy was created by a written instrument, and that instrument be not produced.

EJECTMENT, tried before *Bailey, J.*, at the Fall Term, 1862, of Moore Superior Court.

The plaintiff introduced a grant to Daniel Thompson for the land in controversy, and proved that Thompson died before the date of the demise (viz., 29th January, 1858), and that the lessors of the plaintiff were his heirs-at-law. He further proved that the defendant was in possession at the time of the service of the declaration.

The defendant then introduced a deed, dated September, 1844, from the Sheriff of the county of Moore, to Daniel W. McNair, the illegitimate son of the defendant, for the land in controversy—it having been sold for the taxes. She showed that McNair died in February, 1848, without leaving issue, or brother or sister, or the issue of such. It was further proved that she and her son Daniel were in the actual possession of the land from 1835 till his death, and there was evidence that after his death she continued in the actual possession for two or three years, and that during this time one Jollie and his wife entered upon the land, and occupied the house with the defendant for some short time, and that the defendant left the premises sometime in the spring of 1851, leaving some of her effects in the house with Jollie and his wife. Jollie and his wife remained in possession about one year, when they left; and as soon as they did so, the defendant returned to her dwelling-house, and has continued there ever since.

The defendant offered to show that Jollie was holding the lands as her tenant, and for this purpose she (16) introduced one McIver. The counsel for the plaintiff asked the witness if the contract between Jollie and the defendant as to the lease of the land was reduced to writing, and he stated that it was, and that he was the subscribing witness. The defendant's counsel then proposed to ask the witness if he did not hear Jollie, while he was in possession of the land, admit that he was holding under the defendant. This was objected to by the plaintiff, upon the ground that the contract between Jollie and the defendant was reduced to writing, and was not produced on the trial.

The court rejected the evidence, and the defendant excepted.

It was admitted that the deed from the sheriff to McNair was only color of title.

The court charged the jury that if they believed the testimony to be true, the plaintiff was entitled to recover. There was a verdict for the plaintiff, and a rule for a new trial, which was discharged. Thereupon the defendant appealed.

No counsel in this court for the plaintiff
Strange and *McDonald*, for the defendant.

BATTLE, J. The only question in this case is, whether the parol testimony offered by the defendant, to show that Jollie was her tenant whilst he was living on the land in controversy, was admissible. We are of the opinion that it was, and, therefore, that his Honor erred in rejecting it. The testimony proposed to be given was simply the declaration of Jollie, made while he was residing on the land, that he was there as the tenant of the defendant. The fact that he was on the land was one which the defendant had clearly the right to prove by parol; and the declaration of the tenant was a part of the fact necessarily admissible, for the purpose of explaining it. The terms of the written lease (17) between the defendant and Jollie were in no wise material to be shown, and hence it was unnecessary to produce it. In the settlement, case of *Rex* v. *The Inhabitants of Holy Trinity*, 14 Com. Law, 101, it became important for the defendants to prove that the pauper had gained a settlement in another parish by the occupation of a tenant therein, and the payment of rent therefor; and they were permitted to show those facts by parol, although the pauper held the tenement under a lease in writing. BAILEY, J., said: "The general rule is, that the contents of a written instrument can not be proved without producing it. But, although there may be a written instrument between the landlord and tenant, defining the terms of the tenancy, the fact of the tenancy may be proved by parol without proving the terms of it. It was unnecessary in this case to prove by the written instrument either the fact of the tenancy or the value of the premises."

In the case now before us, the fact of the tenancy having been properly shown by parol, the declaration of the tenant as to the person under whom he held, was admissible by the same kind of evidence as *pars rei gestæ*. This principle is well established in this State by several decisions, of which *Askew* v. *Reynolds*, 18

N. C., 367, is the leading case. For the error committed in the rejection of the testimony offered to show that Jollie held the land in controversy as the tenant of the defendant, the judgment must be reversed, and a *venire de novo* awarded.

(18)

D. A. DAVIS, Cashier, v. JOHN I. SHAVER, Adm'r of H. C. Simonton.

1. An entry upon the trial docket of the word "Judg't," made in the Superior Court, in open court, and in accordance with its regular rules and practice, is an entry of a regular judgment; and can not be vacated at a subsequent term of the Court.
2. What are the facts which accompany the making of such an entry, is a matter to be extracted from the evidence only by the Judge of the court below, and his finding thereupon can not be reviewed in the Supreme Court.
3. Where error does not appear upon the record transmitted to the Supreme Court, the judgment below must be affirmed.
4. Distinctions between judgments, and entries thereof upon the records, stated by READE, J.

(The cases, *Walton v. Smith*, 30 N. C., 520; *Bender v. Askew*, 14 N. C., 149; *Osborne v. Toomer*, 51 N. C., 440, and *State v. McAlpine*, 26 N. C., 140, cited and approved.)

THIS was an appeal from an order made by *Mitchell*, *J.*, at Spring Term, 1866, of Rowan Superior Court.

The facts are sufficiently stated in the opinion of the court.

Blackmer, for the plaintiff.
Wilson, for the defendant.

READE, J. This was a motion to vacate a judgment, which the defendant alleged to be irregular.

If there was error, it does not appear in the record sent up; and, unless error appear, the judgment must be affirmed. *Walton* v. *Smith*, 30 N. C., 520.

The facts, as stated by his Honor, are that the plaintiff sued out a writ in debt. At the return term the defendant, on account of the inadvertence of his counsel, did not appear. At a subsequent term there was upon the trial docket an entry, "Judg't." From this memorial of the judgment, the clerk, after court, transferred the case to the execution docket, stated the debt, interest and costs, and issued execution. His Honor heard evidence as to the proceedings when the aforesaid entry was made, and refused to vacate the judg- (19) ment, upon the ground that he had no power to do so. And he directed the clerk to enter up a formal judgment *nunc pro tunc.*

It does not appear in the statement made by his Honor, as, regularly, it ought to appear, what were the proceedings when the said entry was made, so as to enable the court to see whether the judgment was regular or irregular. If it was regular, that is, according to the course and practice of the courts, his Honor had no power to vacate it. But if it was irregular, that is, contrary to the course and practice of the courts, he had the power to vacate it. *Bender* v. *Askew*, 14 N. C., 149.

There are no facts stated from which it appears to have been irregular; and it does appear that, after a full hearing of the case, his Honor found it to be regular, and directed the clerk to enter it in proper form *nunc pro tunc*. The finding of the facts was for his Honor, and it is not for this court to collect the facts from evidence transmitted with the case. All that is proper for this court to do, is to decide whether from the facts found by his Honor, the judgment was regular or irregular. It is to be regretted, therefore, that his Honor did not state more fully the facts found by him. Evidently this defect was intended to be supplied by transmitting the evidence itself, so that this court could see the evidence upon which his Honor acted. But this imposes upon this court the duty of finding the facts; which it is incompetent to do. It may be proper, however, to state, that in looking to the affidavits which accompany the case, we find it stated by the plaintiff's attorney, who entered the judgment, that it was "entered in open court," and, by the clerk, "that the judgment was taken in accordance with the regular rules and practice of the court." If these were found by his Honor to be true, as we suppose they were, then the judgment was regular, and the court had no power to vacate it.

(20) It was insisted on in the argument that the entry "Judg't," no matter when or how entered, was not a judgment at all. If that be so, it will avail the defendant nothing, because a judgment is not what may be entered, but it is what is considered and delivered by the court. The entry is a memorial of what the judgment was. If there had been no entry at all, it would have been competent for his Honor to have it entered, *nunc pro tunc*, upon his being satisfied that judgment was in fact delivered.

The entry "Judg't," was a note or memorandum of what the judgment of the court was, from which the clerk should enter the judgment in form after court. And this is according to the course and practice of our courts. *Osborne* v. *Toomer*, 51 N. C., 440; *State* v. *McAlpine*, 26 N. C., 140.

PER CURIAM. Judgment affirmed.

Cited: Sharpe v. *Rintels*, *post*, 35; *Crawford* v. *Banks*, *post*, 139; *Jacobs* v. *Burgwyn*, 63 N. C., 193; *Dick* v. *Dickson*, 64 N. C.. 69; *Davis* v. *Shaver*, 63 N. C., 490; *Waddell* v. *Wood*, 64 N. C., 624; *Bell* v. *Cunningham*, 81 N. C., 83; *Logan* v. *Harris*, 90 N. C., 7; *State* v. *Bennett*, 93 N. C., 503; *Moore* v. *Hinnant*, 90 N. C., 164; *Ferrell* v. *Hales*, 119 N. C., 212; *Taylor* v. *Ervin*, *Id.*, 277.

THE STATE v. ERASMUS D. NUTT.

If, pending an appeal in a criminal case, the statute authorizing the indictment is repealed, judgment will be arrested.

MISDEMEANOR, in the distillation of grain, tried before

French, J., at Fall Term, 1864, of Orange Superior Court.

No statement of the case is necessary.

Attorney-General, for the State.

Phillips and *Battle*, for the defendant.

READE, J. Since the trial of the defendant in the court below the statute under which he was convicted has been repealed. The repealing statute does not (21) except from its operation offences already committed. The appeal vacates the judgment, and there is now no law under which judgment can be pronounced against the defendant.

Judgment must therefore be arrested.

PER CURIAM. Judgment arrested.

Cited: State v. *Broduax*, *post*, 43; *State* v. *Long*, 78 N. C., 572; *State* v. *Williams*, 97 N. C., 456.

JAMES L. GARDNER v. EDWARD D. HALL.

1. The tax imposed upon "dead-heads" by the act of 1860-'61, ch. 31, sec. 12, is valid.
2. Such a tax is not a "capitation tax," within the meaning of sec. 3, Art. 4, State Constitution (amendments of 1836), nor is it a violation of the charter of the Wilmington and Charlotte Railroad Company.

(The case, *Attorney-General v. Bank*, 57 N. C., 287, cited and approved.)

ASSUMPSIT, tried before *French, J.*, at Spring Term, 1864, of New Hanover Superior Court.

The following is the substance of the case agreed, submitted to his Honor, and then transmitted to this court:

The plaintiff, under a special permit from the President of the Wilmington and Charlotte Railroad Company, in February, 1863, travelled sixty-five miles on the road of said company as "a dead-head," paying nothing for fare. He was not the president, or one of the directors of said company, nor in so travelling was he acting as an official or employee thereof. The company named above has exchanged bonds with the State of North Carolina. The defendant, as Sheriff of New Hanover County, demanded from the plaintiff payment of the tax upon dead-heads, and thereupon the latter paid the same under protest.

It was agreed that if the court should be of (22) opinion with the plaintiff, judgment should be rendered against the defendant for one dollar and costs, otherwise that there should be a judgment of nonsuit.

The court, *pro forma*, gave judgment of nonsuit. Thereupon the plaintiff appealed to this court.

Person, for the plaintiff.
The Attorney-General, for the defendant.

BALTLE, J. This action was brought to test the legality of the tax imposed upon "dead-heads," by the Act of 1860, chap. 31, sec. 12. The term "dead-head" is applied to persons other than the president, directors, officers, agents or employees of a railroad company who are permitted by the company to travel on the road without paying any fare therefor. The legality of the tax is impeached upon two grounds: First, that it is a poll tax, and, as such, is not imposed as the Constitution of the State requires (Amendments of 1836, art. 4, sec. 3); secondly, that is is an unlawful interference with the contract made by the State with the company in the charter.

The first inquiry is, whether the tax is a capitation or poll tax, in the sense in which that term is used in the Constitution. A capitation tax is one upon the person simply, without any reference to his property, real or personal, or to any business in whch he may be engaged, or to any employment which he may follow. It is rightfully imposed, because of the protection which the government affords to the person, independently of the connection in relation of the person to anything else. Every kind of tax must be paid, either directly or indirectly, by a person, but, if he pay it in consequence of his ownership of property, or of a license to follow a profession or trade, or of making profits by the use of money or other thing, or of a privilege granted to him, either in writing or orally by the State, (23) or by the permission of the State, either expressed or implied, the impost is not a capitation tax; that is, it is not a tax upon his poll or head, simply. In the present case the tax is upon the privilege of a free ride upon a railroad car, granted to him by the company under the implied—-as not forbidden—sanction of the State. It is, therefore, not a capitation tax, such as is meant in the article of the Constitution to which we have referred.

A case much like this has recently been decided by the Supreme Court of the new State of Nevada. By the Revenue Act of that State, passed in 1865, it was enacted that "there shall be levied and collected a capitation tax of one dollar upon every person leaving this State by any railroad, stage, coach or other vehicle engaged or employed in the business of transporting passengers for hire," etc. This tax was objected to upon several grounds, one of which was, that it was a poll tax, and, as such, in conflict with the State Constitution, which limits the poll tax to four dollars upon all male residents of the State within certain ages. The court said: "This can not be considered a poll tax within the meaning of the Constitution. If it be a tax upon the passenger at all, it is levied upon those exercising or enjoying a certain privilege. But it is more properly a tax upon the common carrier, regulated by the number of passengers transported" 1 Nevada, at page 313, in *ex parte Crandall*. The last sentence in the above extract is predicated upon a provision in the revenue law which made it the duty of every person or company owning or having the care of any vehicle employed in the business of transporting passengers for hire, to pay to the sheriff "the said tax of one dollar for each and every person so carried or transferred from this State." The opinion of the court thus expressed, that the tax was rather to be regarded as one upon the common carrier than upon the passenger, does not diminish the force of the view previously taken, that it (24) was not a capitation tax. Whether levied upon the passenger or the carrier, there can be no doubt that the passenger had it to pay; and it could make little difference to him whether he paid it directly to the tax collector or to the carrier in an increased amount of fare.

The second objection to the legality of the tax is, that it violates the contract made by the State with the company, being an unlawful interference with the management of their business, as secured to them in their charter. As this objection involves a restriction upon the powers of the State, it must be made clear by him who urges it. The general rule is "the grant of privileges and exemptions to a corporation is strictly construed against the corporation, and in favor of the public. Nothing passes but what is granted in clear and explicit terms And neither the right of taxation, nor any other power of sovereignty which the community have an interest in preserving undiminished, will be held to be surrendered, unless the intention to surrender is manifested in words too plain to be mistaken." *Ohio Life, etc.* v. *Debolt*, 16 How. (U. S.), 435; *Billings* v. *The Providence Bank*, 4 Pet., 561; *Charles River Bridge* v. *Warren Bridge*, 11 Pet., 545; *Attorney General* v. *Bank of Charlotte*, 57 N. C., 287. In *Nathan* v. *The State of Louisiana*, 7 How., 73, it was said by the Supreme Court of the United States that "the taxing power of a State is one of its attributes of sovereignty And where there has been no compact with the Federal Government, or cession of jurisdiction for the purposes specified in the Constitution, this power reaches all the property and business within the State, which are not properly the means of the general government; and, as laid down by this court, it may be exercised at the discretion of the State. The only restraint is found in the responsibility of the members of the Legislature to their constituents."

The State power of taxation being thus unlim-
(25) ited, except where it comes in conflict with some
power conferred on the general government, the only inquiry which remains is, How the tax upon "dead-heads" riding in a railroad car, can in any proper sense be said to violate the company's charter. It can not diminish the profits of the company or its increase, because no tax is imposed upon the transportation of the passenger. The value of the favor or compliment which the company may wish to bestow upon the "dead-head" is not diminished, because the tax is not imposed at its instance, or for its use. Nor can such a tax be regarded as an impertinent intermeddling upon the part of the State, because the tax applies to those roads only in which the State has an interest as a stockholder, or as a surety by interchange of bonds.

Apart from all this, it is observable that this complaint of a violation of the charter does not come from the company itself, but is urged by one who, it seems, is no party to the contract. The question would have had a more serious aspect, perhaps, if the company had presented itself as the complainant.

The judgment of the court below is affirmed.

PER CURIAM. Judgment affirmed.

Cited: State v. *Bell*, *post*, 87.

(26)

JAMES LACKEY, Administrator of WILLIAM WRAY, deceased, v. W. J. T. MILLER and D. FRONEBERGER.

1. "Seventy-one dollars in current bank money," in a bond promising to pay that amount, held to mean current bank bills, calling on their face for seventy-one dollars.

2. By PEARSON, C. J., *arguendo*, such a bond is not negotiable; and, after the day of payment is past, the proper remedy upon it is *covenant*, in which case the measure of damages would be the value at the time the bond became due of that amount of bank bills, in United States coin.

(The case of *Hamilton v. Eller*, 33 N. C., 276, cited, distinguished, and approved.)

DEBT upon a bond, brought up by successive appeals from the judgment of a Justice of the Peace for Cleveland County.

The following is the case agreed, submitted to *Shipp*, *J.*, at Spring Term, 1866, of Cleveland Superior Court.

The plaintiff, on the 3d of March, 1865, exposed to public sale a cow, and the defendant Miller became the purchaser, and, in accordance with the terms of sale, gave the following bond for the purchase-money:

"$71.00. Six months after date we or either of us promise to pay James Lackey, administrator of Wm. Wray, deceased, seventy-one dollars in current bank notes, for value received of him. March 3, 1865."

This was signed and sealed by the defendants.

It was agreed by the parties that, at the time of the sale, the cow was worth twenty dollars, and also that, at that time, there was no "current bank money" in circulation, and that the notes of State banks were being bought and sold at from ten to thirty cents in the dollar.

It was also agreed by the parties, that at the time the note became due there was in circulation a currency known as "greenbacks," and also the notes of the National banks.

Upon the above statement of the facts, by consent of parties, it was submitted to the court to determine whether the plaintiff is entitled to judgment, and, if so, to what amount?

(27) The court being of opinion that the plaintiff was entitled to recover, gave judgment for the full amount of the note declared upon. From this judgment the defendant prayed an appeal to the Supreme Court. No appeal bond was required.

Bynum, for the plaintiff.
No counsel for the defendant.

PEARSON, C. J. The case of *Hamilton* v. *Eller*, 33 N. C., 276, was relied upon in the argument to support the judgment of the court below. There is a material difference between that case and the one now before us. In that case the defendant promised to pay to the plaintiff the sum of $150, "payable January 1, 1844, in good trade, to be valued," etc. Without explanation or qualification, a promise to pay one hundred and fifty dollars means one hundred and fifty dollars in United States coin, that being the only legal tender or money; and as the defendant had not availed himself of the right reserved, to pay "in good trade," it was held that he had become liable to pay in money, i. e., in United States coin; for there was nothing to explain or qualify the promise. The stipulation that the debt might be discharged in "good trade" did not tend in anywise to show that the defendant did not owe to the plaintiff one hundred and fifty dollars in money.

In our case the promise is, not to pay seventy-one dollars in United States coin, which may be discharged by paying enough current bank money to make up that amount in good money, but to pay seventy-one dollars "in current bank money," i. e., seventy-one current bank money dollars; in other words, current bank bills calling on their face for seventy-one dollars, in the same way as where one promises to pay seventy one dollars *in currency*, the meaning is to pay current notes calling on their face for seventy-one dollars, as distin-
(28) guished from seventy-one dollars in United States coin or, as is termed, "in good money."

Any other construction of instruments like these would lead to the absurdity of supposing that the same words amount to a promise to pay in United States coin, i. e., good money, and also to a promise to pay in "current bank bills" which are not good money; whereas, it is perfectly clear that the party intends to admit a debt of a given amount, not in United States coin, as in the case of *Hamilton* v. *Eller*, but only in current bank bills, e. g., seventy-one current bank money dollars, or current bank bills, calling on their face for seventy-one dollars.

Currency means, "what passes among the people," and is made by them to answer, in some degree, the purposes of money. The expression, "a depreciated currency," was quite common in the years 1864 and 1865, and the idea that nothing could be considered current unless it was convertible in United States coin at par was entertained by no one. Indeed, the truth is, that "the currency"—that is to say, the notes of the Confederate States, issued for the purpose and taking the place of a circulating medium—had become so far depreciated that the bills of our banks were sought after, and hoarded up, as being a good deal better than "the currency": and when the defendant undertook to pay the price of the cow in "current bank money," it was understood that he promised to pay bank notes amounting on their face to seventy-one dollars, as distinguishable on the one hand from Confederate notes, or *currency*, and on the other from United States coin, or *money* In the same way, a promise at this date to pay seventy-one dollars in greenbacks, does not mean—to pay seventy-one dollars in United States coin, or money, to be discharged by that amount of greenbacks, which, according to the rate of discount, will make that amount in United States coin, or money; but is a promise (29) to pay greenbacks, amounting on their face to seventy-one dollars.

In this view, which we believe to be the true one, the plaintiff ought to have brought an action of covenant to recover damages for a breach of promise to pay current bank bills, calling on their face for seventy one dollars—in which case the measure of damage would be the value of that amount of bank bills in United States coin.

It is certain that a bond of this kind is not negotiable as a bond for money. But from the case agreed, we see that the object of the parties is to have the question settled without reference to the form of action; and, in pursuance of the agreement, the judgment below is reversed, and judgment will be rendered for twenty dollars (which we consider to have been the value of seventy-one dollars in current bank notes at the time that the note fell due), together with interest from the maturity of the note.

PER CURIAM. Judgment accordingly.

Cited: Fort v. *Bank, post*, 420; *Patton* v. *Hunt*, 64 N. C., 166; *Williams* v. *Rockwell*, 64 N. C., 327; *Marriner* v. *Roper Co.*, 112 N. C., 167.

JOHN J. A. LITTLE, and JACOB S. LITTLE v. GRIFFIN S. HAMILTON.

A. B., a member of a partnership for farming and tanning, purchased a mule. The purchase was made by A. B. alone, nothing was said of its being for the firm, and there was no evidence that the mule had ever been on the joint farm, or in the tannery of the plaintiffs. An action having been brought in the name of the firm for deceit, etc., in the sale; upon a motion to nonsuit: *Held*,

1. That in the absence of other testimony, there was not only some, but plenary evidence of the allegation that the mule was bought for the firm.
2. That the act of issuing the writ in the name of the firm, raised the presumption that the mule had been bought for it.

TRESPASS ON THE CASE, tried before *Kerr, J.*, at Fall Term, 1862, of the Superior Court of Union County.

The case stated by his Honor was as follows:

(30) This was an action for deceit and false warranty in the sale of a mule. The plaintiffs declared as partners acting and trading under the style and firm of Jacob Little & Co. In support of their declaration they showed that a partnership existed between the plaintiffs before, at the time of, and since the commencement of this action, both in farming and in the tannery business. It was also shown that the trade for the mule in question was made by Jacob S. Little alone, and that nothing was said of the purchase being made for the firm. There was no evidence on the trial that the mule had ever been used on the joint farm or in the tannery of the plaintiffs. Upon this testimony the counsel for the defendant moved to nonsuit the plaintiffs, upon the ground that there was no evidence of any joint interest upon the part of the plaintiffs in the purchase of the mule. But, by consent, the court reserved the point, and submitted the other testimony touching the deceit and false warranty, with the understanding that if the jury should find a verdict for the plaintiffs, the court, if of opinion with the defendant upon the point reserved, might set the verdict aside and enter a nonsuit.

The jury having found a verdict for the plaintiffs, the court, upon consideration, being of opinion that there was no evidence that the mule was purchased for the firm, set the verdict aside, and directed a nonsuit to be entered. From this judgment the plaintiffs appealed.

Phillips and *Battle*, for the plaintiffs.
Wlison, for the defendant.

PEARSON, C. J. We do not concur with his Honor in the view taken by him in respect to the ownership of the mule

The fact that Jacob Little was in partnership with John "in farming and in the tannery business,"
(31) in the absence of any evidence that Jacob carried on any separate business of his own in which

mules and horses were needed, was not only some evidence to be left to the jury that the mule was purchased for the firm, but, as it seems to us, was plenary evidence of the fact. It was a matter of indifference to the defendant whether the mule was purchased for the firm or for Jacob Little alone; and when the existence of the firm was established, the act of issuing the writ in the name of the persons composing the firm is very similar to the act of sending the mule to the farm or tannery, and raised a presumption that the mule was bought for the firm, so as to put upon the defendant—if he wished to defeat the action on a ground which did not affect its results—the onus of proving that the mule was, in fact, bought for Jacob Little alone.

The nonsuit will be set aside, and a judgment entered upon the verdict for the plaintiffs, in pursuance of the agreement under which the question was reserved.

PER CURIAM. Judgment reversed.

W. H. ATKIN v. ADOLPHUS MOONEY.

1. Where a sheriff, having first returned an execution "satisfied," afterwards, with leave of court, amended the return thus: "Received from the defendant Confederate money for the debt, which the plaintiff refuses to take, therefore the sale is not satisfied, and the same is returned, that an *alias* may issue to sell the land;" and then taking out such *alias*, levied upon the land: *Held*, that the petition of the defendant in such execution, praying for a *certiorari* and *supersedeas*, ought not to have been dismissed, but should have been placed upon the trial-docket.

2. A plaintiff has a right to instruct a sheriff to collect in specie; but the latter, in the absence of instructions to the contrary, is justified in receiving currency, i. e., whatever is passing currently, in payment of debts of the character of that which he has to collect.

(The cases, *Dickerson v. Lippitt*, 27 N. C., 560, and *Governor v. Carter*, 10 N. C., 328, cited and approved.)

PETITION *for a certiorari*, brought up by an ap-

(32) peal from an order dismissing the petition, made by *Osborne, J.*, at Fall Term, 1864, of Rutherford Superior Court.

The proceedings in the courts below are sufficiently stated in the opinion.

Logan, for the petitioner.
Bynum, for the defendant.

READE, J. The defendant sued out an execution against the petitioner, in another proceeding between them, and whilst it was in the hands of the sheriff, the petitioner paid it off to him, and took a receipt in full, and the sheriff returned the execution "satisfied." Subsequently, the sheriff obtained leave of the court to amend his return, which he did as follows: "Received from the defendant (the present petitioner) Confederate money on the debt, which the plaintiff refuses to take, therefore the sale is not satisfied, and the same is returned, that an *alias* may issue to sell the land." An *alias* did issue, and the sheriff levied on the property of the petitioner, who was the defendant in that suit. Thereupon the petitioner filed his petition for a *certiorari* and *supersedeas*, and obtained the same. Upon the return of the petition and proceedings into court, his Honor dismissed the petition, from which order the petitioner appealed.

The case does not state the grounds upon which the petition was dismissed, and we are left to collect from the whole case whether it ought to have been dismissed or placed upon the trial docket.

It was clearly within the power of the County Court to allow the sheriff to amend his return. *Dickinson* v. *Lippitt*, 27 N. C., 560. So much of the case therefore must stand upon the return as amended.

Again, a plaintiff has the right to instruct the sheriff to collect in specie, but, without such instructions, (33) the sheriff may collect in currency. *Governor* v. *Carter*, 10 N. C., 328. A sheriff, in the absence of instructions to the contrary, would be justified in receiving what was passing currently in payment of debts of the character which he had to collect. Yet there must be some limit to this discretion of the sheriff; for, if he received funds which are so much depreciated that it would amount to notice that the plaintiff would not receive them, he would be liable to the plaintiff in the execution.

How the facts were in this case we are not informed. We do not know whether Confederate money was current in the payment of such debts as the sheriff held for collection or not. And these facts are necessary to determine the liability of the sheriff to the plaintiff in the execution. But they are not necessary to determine the present case, because the extent of the sheriff's liability is not the question before us. That question is: Had the execution been satisfied, so far as the petitioner is concerned? He had paid the sheriff in funds which the latter received without objection; and these funds have never been returned or offered to be returned, so far as we are informed. The petitioner has a receipt in full for the debt, and, outside of the declarations of the sheriff, it does not appear that he did not pay in good money.

We are therefore of opinion that the petition in this case ought not to have been dismissed, but should have been placed upon the trial docket, so that the question as to the satisfaction of the execution by the petitioner may be properly raised and decided.

PER CURIAM. Judgment reversed.

Cited: Emerson v. *Mallett*, 62 N. C., 236; *Barham* v. *Gregory*, 62 N. C., 249; *McKay* v. *Smitherman*, 64 N. C., 50; *Baird* v. *Hall*, 67 N. C., 233; *Utley* v. *Young*, 68 N. C., 391; *Melvin* v. *Stevens*, 84 N. C., 82.

Dist.: Greenlee v. *Sudderth*, 65 N. C., 473; *Purvis* v. *Jackson*, 69 N. C., 480.

(34)

S. A. SHARPE v. J. RINTELS & COMPANY, and J. F. ALEXANDER and R. A. McLAUGHLIN, as Adm'rs of A. R. LAWRENCE, dec'd.

A writ in debt had been returned to Fall Term, 1863, and counsel marked his name for the defendants, but entered no plea; at Fall Term, 1864, without the knowledge of the defendants, except M. (who was one of two administrators of the surety to the debt), and without the knowledge of their counsel, the counsel for the plaintiff signed "Judgment by default final for," etc.; at the next term (Spring, 1866), the plaintiff's counsel agreed that the judgment might be stricken out as to all of the defendants excepting the administrators: *Held*, that there was no error in the refusal of the Judge below to strike out the judgment as to such administrators.

(The case of *Davis v. Shaver*, *ante*, 18, cited and approved.)

DEBT, returnable to Fall Term, 1863, of Iredell Superior Court.

At the return term the same counsel was employed by each of the defendants, and he marked his name to the case, but entered no pleas. At Fall Term, 1864, the counsel of the plaintiff signed judgment upon the docket against all the defendants, without the knowledge of their counsel, or of any of the defendants except McLaughlin, who was the clerk of the court, and made no objection, supposing that his counsel would give it all proper attention. Execution was issued from Fall Term, 1864, and after that no term of the court was held until the Spring of 1866, when the defendants, Rintels & Co. moved to set the judgment aside, on the ground that it had been obtained and taken irregularly. With the consent of the plaintiff, this was done as to Rintels & Co. Thereupon the plaintiff entered a *nolle prosequi* as to them. The court, *Mitchell, J.*, presiding, refused to set aside the judgment against the other defendants, who were administrators of one Lawrence, the surety upon the debt, and they being dissatisfied appealed to the Supreme Court.

The entry of judgment was upon the minute
(35) docket, as follows: "Judgment by default final for $1,600 principal, $272 interest, and costs."

Clement, for the plaintiff.
Boyden and *Bailey*, for the defendants.

READE, J. This case falls under the principles laid down, and the authorities cited in *Davis* v. *Shaver*, *ante*, 18; and for the reasons there given the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Crawford v. *Bank*, *post*, 139; *State* v. *Alphin*, 81 N. C., 567; *Moore* v. *Hinnant*, 90 N. C., 166; *State* v. *Bennett*, 93 N. C., 505.

THOMAS M. PENNY v. JOHN SMITH.

1. Even after final judgment has been entered, a court has power, at any time during the same term, to amend the proceedings in a suit; therefore,
2. Where a petition had been dismissed, and the petitioner had prayed for and obtained an appeal from the order: *Held*, that the County Court had power during the same term, to allow the petition to be amended; also, that the terms, upon which such allowance was made, was a matter exclusively within its discretion.

(The case of *Plunkett v. Penninger*, 47 N. C., 367, cited and approved.)

PETITION FOR A CARTWAY, filed at December Term, 1862, of Davie County Court. At March Term, 1863, the petitioner was dismissed, and thereupon the petitioner prayed an appeal to the Superior Court. Afterwards, during the same term, the petitioner moved to amend his petition, and this was allowed by the court.

In the Superior Court, at Fall Term, 1863, the defendant moved to dismiss the petition, upon the ground that the County Court had no power to amend, after (36) dismissing it and granting an appeal. *Bailey, J.*, having refused to dismiss, the defendant appealed to this court.

Clement, for the petitioner.
Furches, for the defendant.

PEARSON, C. J. The Judge had a discretion to allow an appeal bond to be filed in the Superior Court, and with the exercise of that discretion this court has no right to interfere.

The motion to dismiss the appeal, upon the ground that the County Court had no power to amend the petition after dismissing it and granting an appeal to the Superior Court, was put on the ground that the court was *functus officio* in respect to the case, and had no further control over it. In this the counsel for the defendant is mistaken. The proceedings of the court are *in fieri* until the expiration of the term, and, until then, the record remains under the control of the court. It may strike out the judgment and enter a different one; it may amend the pleadings, and do any other act necessary to effect the purpose of justice—and this as well after as before what purports to be a final judgment has been entered. In other words, the court has the whole term during which to consider of its action; and any entry made on a former day does not affect its power on a subsequent day. It is every day's practice in the Superior Courts to allow the writ to be amended, by entering a larger sum; or in ejectment, to extend the time of the demise—and these amendments are usually applied for and allowed, after judgment has been entered and an appeal taken. But it is a rule that the court will not allow an amendment which takes away the ground on which the party has appealed, except upon the payment of all costs; and then the appellant can withdraw the appeal. Such amendments are also made in this court, but we take care not to amend a party (37) out of court; that is, take from under him the ground on which he appealed, except upon the payment of all costs. If the County Court had not allowed the amendment in this case, it would have been ordered in the Superior Court, or in this court; so that there is no room for complaint, except as to costs. *Plunkett* v. *Penninger*, 47 N. C., 367.

The County Court had full power to allow the amendment at the time that it was made. Whether the amendment should have been made without costs, or upon payment of costs, was a matter of discretion, with which the Superior Court had no right to interfere. There is error

PER CURIAM. Judgment affirmed.

Cited: Robeson v. *Hodges*, 105 N. C., 50; *Dobson* v. *Chambers*, 78 N. C., 337.

W. R. S. BURBANK v. L. L. WILLIAMS.

A question having been made in the Superior Court as to the constitutionality of an act which gave defendants further time to plead: *Held*, that, inasmuch as the statute had been repealed before judgment was pronounced in this court (especially, as the appeal had already given the defendant all the delay that he asked), the court would not entertain the question merely for the purpose of settling the incidental question of costs.

DEBT, upon a promissory note, returned to Rowan Superior Court, at Fall Term, 1864. At Spring Term, 1866, no pleas having been entered, the plaintiff moved for judgment according to the note. The defendant resisted this motion upon the ground that the stay law of 1866 (Acts of 1865-'66, chap. 16), gave the defendant further time to plead. *Mitchell, J.*, refused to give the judgment prayed for, and thereupon the plaintiff appealed to the Supreme Court.

Blackmer, for the plaintiff.
Boyden and *Bailey*, for the defendant.

(38) PEARSON, C. J. This case was brought up by

the plaintiff, for the purpose of obtaining the opinion of this court on the question as to the constitutionality of the act of the General Assembly, entitled "An act to change the jurisdiction of the courts, and the rules of pleading therein," ratified 10th March, 1866.

The statute in question is repealed by an ordinance of the Convention at its last session, upon the same subject, and there is nothing involved in the case as it now stands except the costs of the appeal. Under these circumstanes the court does not feel itself called upon to decide on the constitutionality of the statute simply to dispose of a question of costs, especially as the defendant has already obtained the delay in reference to the time of pleading, which was the matter of contention.

Without entering into the question, we affirm the judgment below.

PER CURIAM. Judgment affirmed.

THE STATE v. JACOB BLACKWELDER.

1. A prisoner has a right to be present at the bar at all times during the progress of his trial; therefore,
2. It is error in a Judge to give any charge to the jury in the absence of the prisoner.

MURDER, tried at Spring Term of Rowan Superior Court, before *Mitchell, J.* The prisoner was convicted and sentenced, and thereupon appealed to this court. It is unnecessary to make any statement of the case.

Attorney-General, for the State.
Boyden and *Bailey*, for the prisoner.

BATTLE, J. The bill of exceptions contains (39) many statements of testimony, rulings of the presiding Judge, and exceptions of the prisoner's counsel.

Our attention has been particularly called to the following, which relates to what occurred after the jury had received the first instruction from the court, and had retired to consider of their verdict: Not being able to agree, the jury came into court at a late hour in the night, and it is stated that his "Honor again charged the jury in the absence of the prisoner and portion of the counsel." The jury being still unable to agree, it is set forth that his "Honor again charged them some hours after, in the absence of both the prisoner and his counsel; and, at the request of the jury, he repeated a portion of the charge he had before given them "

The question thus presented is one of very great importance in the trial of capital crimes. It is whether the prisoner has a right to be present at the bar at all times during the progress of his trial. We believe that the general impression among the profession in this State is, and always has been, that he has such right; and that the practice has always been in conformity to this impression. The point has never been directly adjudicated, but in the case of *State* v *Craton*, 28 N. C., 104, the implication in favor of the existence of the right is so strong that we must regard it as equivalent to a positive decision.

In that case it was objected that it did not appear by the record that the prisoner was personally present in court at the time of the trial and sentence. The Supreme Court, without the slightset intimation that such presence of the prisoner was unnecessary, overruled the objection, upon the ground that, taking the whole record together, it did sufficiently appear, either by positive assertions or necessary implications, that he was present in court both during his trial and at the time sentence was passed upon him.

The researches of the learned counsel, who have (40) argued the case before us, have shown that the same rule prevails in England and in many States of the Union, particularly in Georgia, Virginia, Tennessee, Illinois, Maryland, Pennsylvania and New York. The rule, indeed, is but a full development of the principles contained in the seventh section of the Declaration of Rights—"That in all prosecutions, every man has a right to be informed of the accusation against him, and to confront the accusers with witnesses and other testimony"; and as such, it ought to be kept forever sacred and inviolate.

Whether the presence of the prisoner's counsel, as well as that of the prisoner himself, during his trial is necessary, we are not now called upon to decide. There may be many cases in which exigencies might occur during the progress of a trial where the counsel might be of more advantage to the prisoner than he could be to himself. The argument, therefore, in favor of requiring the presence of his counsel, or of some one or more of them, as well as of the prisoner, is very strong, but we will not undertake to decide upon its validity until a case shall arise in which it is our duty to do so.

The error to which we have adverted makes it necessary to order a *venire de novo*, and it must be so certified to the Superior Court for the county of Rowan.

PER CURIAM. *Venire de novo.*

Cited: State v. *Bray*, 67 N. C., 284; *State* v. *Jenkins*, 84 N. C., 814; *State* v. *Paylor*, 89 N. C., 541; *State* v. *Kelly*, 97 N. C., 405.

(41)

THE STATE v. THOMAS BRODNAX, a freedman.

In a case where the facts were, that the prisoner, a slave, was dancing, singing and making a considerable noise, with other slaves, between the negro houses and the overseer's house, which were about thirty feet apart; that, upon the overseer, who is the deceased, and was an elderly man, ordering them to stop the noise, all did, except the prisoner, who, upon being again ordered to stop, returned an answer which offended the deceased; that the latter replied "if you say that again, I will mash your mouth," whereupon he repeated the words, dancing the while, with his face towards the deceased, but retreating towards the negro houses; that the deceased then walked towards him with a stick (a deadly weapon) in his hand, and struck him with it upon the head, twice; and thereupon the prisoner wrenched the stick from the deceased, and struck him one blow with it, with his utmost strength, and fled; the deceased falling, and dying in a few moments: *Held*, that the killing was manslaughter, and not murder.

(*State v. Will*, 18 N. C., 121, cited and approved; *State v. Nutt*, *ante*, 20, cited, approved and distinguished.)

MURDER, tried at Spring Term, 1866, of Rockingham Superior Court, before *Gilliam, J.*

Upon the trial, the jury found by special verdict the following facts: "The prisoner, Thomas Broadnax, was a slave, and in January, 1865, was the property of Dr. E. T. Broadnax, of Rockingham County, and the deceased was the overseer of the said Broadnax, and entrusted with the management of the prisoner at the time of the commission of the homicide; that late in the evening of the 2d day of January, after the day's work was done, and the negroes had returned to their houses, the prisoner, his sister, a grown woman, and some small children assembled in the plat of ground which lay between the negro houses and the overseer's house; that the space between their houses was about thirty feet; that the prisoner and those with him began to dance and sing, and made a considerable noise; that the deceased came to the door and ordered them to cease making the noise; that they all immediately ceased, (42) except the prisoner, who continued to dance and sing; that the deceased then said to him, 'Tom, you are no better than the young ones, and you must stop your noise too'; that the prisoner replied, 'You will not let me go to master's house to play, and will not let me play here, and I don't know where to play'; that the deceased said to him, 'If you say that again I will mash your mouth'; that the prisoner repeated these words, and was at the time dancing, with his face towards the deceased, and his back towards the negro houses, and as he danced was going backwards towards the negro houses; that the deceased walked towards him with a stick in his hand, and struck him twice upon the head with the stick; that the prisoner wrenched the stick out of the hand of the deceased, and struck him one blow with it, and fled: that the deceased immediately fell to the ground, and died within a few minutes, his skull being fractured by the blow; that the deceased was an elderly man, and the prisoner a man just grown, and when he struck the deceased he used his utmost strength; that the stick with which the prisoner struck the deceased was the same with which he had twice been stricken by the deceased, was about three inches thick at the larger end, and an inch and a half at the smaller end, and three feet in length; and, in the opinion of the jury, was a deadly weapon, it being a heavy hickory stick; that the homicide, and all the circumstances connected therewith, took place in Rockingam County," etc., etc.

His Honor, considering that the facts above stated constituted a case of manslaughter, gave judgment accordingly. Whereupon the Solicitor for the State appealed to this court.

The Attorney-General, for the State.
Phillips and *Battle*, for the prisoner.

(43) BATTLE, J. At the time when the homicide with which the prisoner stands charged was committed, he is stated in the special verdict to have been a slave; but at the time of the trial for the offence, we know, that by the operation of a public law he had be-

come a free man. Under these circumstances, it is contended by the counsel for the prisoner that his case is to be considered and determined upon the same principles as would be applicable to the case of one free man killing another. This position is sought to be sustained by the analogy of the effect which the repeal of a statute has upon an offence which was committed while the statute was in force. In such case the offender can not be tried, or if tried before the repeal no judgment can afterwards be pronounced against him, as has been decided at the present term in *State* v. *Nutt*, *ante*, 20. The argument is, at first view, plausible and ingenious, but it will not bear the test of a critical examination. The offence, of which the prisoner is accused, has not been repealed by any statute, nor by the operation of any public law. It is now, as it was when it occurred, a high crime, and the only proper inquiry is as to the degree of its criminality; and that must, in the nature of things, be determined by the circumstances attendant upon its commission. To be murder, the crime must have been committed with malice prepense; and if the offender were at the time actuated by that malice, we can not see by what process that malice has been taken away by the change in his condition as a man. If, while a master were, for a proper cause, inflicting a moderate chastisement upon his apprentice, the latter were to kill him with a pistol or other deadly weapon, and were not to be tried for it until after he became of age, we presume he could not prevent a conviction of murder, by the allegation that, being then of age, it must be regarded as a legal provocation that his master struck him while he was under age. We are not aware of any principle of criminal law by which such a
(44) defence can be sustained, and we think the analogy between that and the present case much stronger than the one insisted on by the prisoner's counsel. Having decided that the prisoner must be held accountable according to the principles applicable to his status when the alleged crime was committed, it becomes our duty to ascertain what those principles are,

and then apply them to the facts set forth in the special verdict.

In performing this duty, our task is rendered comparatively easy by the full and able exposition of the subject, which is to be found in the arguments at the bar, and in the opinion of the court, in the case of the *State* v. *Will*, 18 N. C., 121. The essential principle clearly laid down and strongly enforced in that case is, "that while unconditional submission is the general duty of the slave, and unlimited power is, in general, the legal right of the master," "it is certain the master has not the right to slay his slave, and it is equally certain that the slave has a right to defend himself against the unlawful attempt of his master to deprive him of life." In the application of this principle to the facts of that case, the court held that the slave who had killed his temporary master while the latter was, as the slave had every reason to suppose, attempting to take his life, was guilty of manslaughter only, and not of murder.

Let us see what will be the application of this principle to the facts stated in the special verdict now before us. The facts, to which this test must be applied, are those only which are distinctly set forth in the verdict, and such other facts as may be fairly and legally inferred from them. It appears, then, that, at the time when the homicide was committed, the prisoner, who was then a slave, was guilty of an offence which, though it was neither an act of resistance nor rebellion, fully justified the deceased, who was his temporary master, in inflicting punishment upon him. The (45) master, in the exercise of his discretion, had the right to select the mode of punishment, and therefore had the right to strike his slave; and it was the duty of the slave to submit. But the master had no right to kill, and if he attempted to kill, or acted in such manner as apparently to endanger life, the slave was not bound to submit unresistingly to an attack which might end in his destruction. Here, then, we are brought to consider the character and attendant circumstances of the chastisement inflicted by the master upon his slave. The master is stated to have been an elderly man, but nothing is said as to his size or strength. "Elderly," is defined by Webster to mean "somewhat old; advanced beyond middle age; bordering on old age." As the law will not, in the absence of testimony to that effect, presume that the man is sick, infirm, or a cripple, we must assume, upon the special verdict, that the deceased possessed the ordinary vigor of a man of the medium size, past middle age, but not yet arrived at old age. The instrument he used is described to have been a heavy hickory stick, three feet long, three inches thick at the larger end, and tapering off to one and a half inches thick at the smaller end. The prisoner was a young man "just grown"; and the jury find that the stick, while in his hand, was a deadly weapon. We think that such a bludgeon was equally so in the hands of the deceased While the prisoner was in an act of disobedience, the deceased advanced upon him, threatening "to mash his mouth," if he repeated certain offensive words which he had just uttered. The words were repeated, and the deceased struck the prisoner two blows on the head with the stick, when the latter wrenched it from his hands and struck him one fatal blow, and then fled.

It is a fair legal inference from this account of the transaction, which we take from the special verdict, that the blows given and received by the parties to the (46) contest. followed each other in rapid succession; and such we have no doubt was the fact. The Attorney General assumes, in his argument, that the blows struck by the deceased were slight. The other facts do not justify the inference. The deceased was provoked, and justly provoked, by the combined disobedience and insolence of the prisoner. The threat of mashing the prisoner's mouth showed that he was angry. The quickly repeated blows evinced a purpose to inflict bodily hurt, and the weapon used would carry death, if wielded with sufficient force, as certainly as would a pistol or a bowie knife. Such were the circum-

stances at the moment when the prisoner snatched the stick from the hands of the deceased, and instantly killed him with it. Was this killing the result of malice, or of what we must adjudge to be a legal provocation? This is the question, and it is one upon which we have deliberated with much anxiety, and have come to a conclusion with no little hesitation. That conclusion is, that the prisoner acted under a well-grounded fear that his life was about to be taken, and struck the fatal blow from the irrepressible impulse of the instinct of self-preservation. The consequence is, that we must hold that his Honor, in the court below, committed no error in pronouncing judgment upon the special verdict, that the prisoner was not guilty of murder, but was guilty of the felonious killing and slaying of the deceased. In support of this judgment, we think that the case of the *State* v. *Will*, hereinbefore referred to, is a full and direct authority. Of *Will's* case, it may be observed, however, that in the earlier part of the transaction, which led to the fatal result, the attack upon the slave was of a more deadly character than was exhibited in the beginning of the contest in the present case; but, at the moment when the fatal blow was struck, there was less apparent cause for the slave to fear that death was then to be inflicted in the former than in the latter case. But as in each case it may be seen that
(47) the slave was impelled to kill his temporray master, in defence of his own life, the same principle must apply to both, varying though they do in some of their circumstances.

PER CURIAM. Judgment upon the special verdict that the prisoner is not guilty of the murder wherewith he stands charged, but is guilty of the felonious slaying and killing of William Duncan.

THE STATE v. LAWSON, a freedman.

Confessions made by a prisoner, a slave, whilst witnessing torture inflicted upon another prisoner for the same offence, in order to extort confession from him, are not competent evidence.

(The case of *State v. George*, 50 N. C., 233, cited and approved.)

BURGLARY, tried before *Mitchell, J.*, at Spring Term, 1866, of Cabarrus Superior Court. The prisoner was convicted, and, the rule which had been obtained for a new trial having been discharged, judgment was pronounced according to law. Thereupon he appealed to this court.

The following is the case stated by his Honor, so far as the opinion of the court renders it necessary that it shall be given.

The prisoner, Lawson, then a slave, and George, a free man of color, were indicted at Fall Term, 1864, of Cabarrus Superior Court, for a burglary committed upon the dwelling-house of John Petre * * * On the second day after the burglary had been committed, several persons came together at the house of the prosecutor, to aid him in detecting the perpetrators and recovering his lost property. Information indicated George and Lawson as the criminals. The (48) former lived about three-quarters of a mile from Petre, and Lawson lived about a mile distant in the opposite direction One of the party went to apprehend George, and two others after Lawson. George was brought first and tied at the house of the prosecutor, and soon afterwards Lawson was produced.

The party endeavored by threats, and by severe whipping, to extort from George a discovery of the stolen property. During a pause in this whipping Lawson said: "*If you will not whip me, and will go with me, I will show you the property.*" The party who had apprehended Lawson had not tied him. They found him at work, and he denied all knowledge of the burglary, and denounced, in strong terms, anyone that would rob such a man as old Mr. Petre. He walked with the party to the house of Petre, and was not more than fifteen yards distant from where George was confined, but was the object of very little attention, until he made the remark above recited. Neither threats nor promises had been made to him. After he made the offer, two of the party went with him, and, at the distance of about four hundred yards from the house of the prosecutor, he showed them the stolen property, concealed under a covering of brush. As they returned with the goods, Lawson, without any incitement, stated voluntarily that *he and George had broken open the window of the room from which the goods were taken with an axe and iron wedge; that George had entered through the window and handed him the property at the window; that George kept nothing but one bale of cotton-yarn, and he, Lawson, undertook to conceal the remainder of the property until he could sell it for their joint benefit.*

The evidence of the remarks made by Lawson previous to his going for the stolen property, and of the statement made by him after it was found and the party was returning, was objected to by the counsel for the prisoner, but was admitted by the court. And for this the prisoner excepted.

(49) *Attorney-General*, for the State.
Wilson, for the prisoner.

PEARSON, C. J. The case of *The State* v. *George*, 50 N. C., 233, is one precisely in point here, and we adopt the opinion delivered in that case as our opinion in this.

Everything that the prisoner said and did, after he had witnessed the torture inflicted upon George, was "with the fear of the lash before his eyes!" The party had assembled with a determination to find out the truth by means of the lash, forgetful of the rule—"The end does not justify the means."

There is error. This opinion will be so certified.

PER CURIAM. *Venire de novo.*

Cited: State v. *Andrew*, *post*, 207; *State* v. *Lowhorne*, 66 N. C., 640.

THE STATE v. WILLIAM MARSHALL.

1. The prisoner, a stranger to the prosecutrix, who was a girl of between 13 and 14 years of age, had met her upon her way from a neighbor's, and offered to go home with her, a distance of less than a mile; his offer being accepted, he dismissed some children who had been acting as her guides: *Held*, that the girl's following him out of the road for a short distance into the woods; as also her not stopping upon her way home, after the alleged rape had been committed, to tell her aunt of it (she having passed the aunt's house and seen her)—did not warrant a prayer for a charge to the jury that the evidence of the prosecutrix should be disregarded altogether.
2. In order to confirm the evidence of a witness, it is competent to ask whether it does not concur with statements previously made by the witness, out of court.

(The case of *State v. George*, 26 N. C., 324, cited and approved.)

RAPE, tried at Spring Term, 1866, of McDowell Superior Court, before *Shipp, J.* From the judgment in the case the defendant appealed to this court.

(50) The person upon whom the crime was committed, Sarah Rooker, was a girl of between thirteen and fourteen years of age, and stated that having been upon a visit at a neighbor's house in Rutherford County, about 3 or 4 o'clock she started to her father's house, which was a mile or so distant. That for company and as guides she took with her two children of the neighbor. That at about half a mile from the house they met the prisoner, who proposed to go home with her, and sent the children back. They proceeded on the road towards the home of the witness, he leading and she following, until they came to the head of a hollow or ravine, when the prisoner turned off from the road, and witness followed. That very soon after they left the road, the prisoner by violence and threats committed the crime in question, and having led her back to the road, threatened that he would kill her if she told what had occurred. She then went home, passing the house of an aunt (whom she saw), but did not stop or tell her aunt what had happened. Immediately upon reaching

home she told her mother, who, upon examination, found marks of great violence upon her person.

The mother was examined upon the trial, and having been asked by the Solicitor whether the statement made by Sarah at the trial was the same as that made upon her return home, stated that it was.

What else was material at the trial and in the charge of his Honor appears in the opinion of the court.

Attorney-General, for the State.

No counsel in this court for the defendant.

READE, J. The prisoner moved for a new trial upon three grounds:

1. That inasmuch as the witness, Sarah Rooker, upon whom the rape was charged to have been committed, did not disclose the fact to the first person whom she saw after the occurrence, her testimony was to be disregarded altogether (51)

2. That inasmuch as Sarah Rooker followed the prisoner into the woods, it was conclusive evidence of her assent to the act.

3. That it was error to allow the State to support the testimony of the said Sarah Rooker, by proving that she gave the same account of the transaction when she first disclosed it to her mother.

As applicable to the first two grounds his Honor charged the jury, "that if the witness, Sarah Rooker, was to be believed, the charge in the indictment was made out. But it was exclusively for them to say whether she had told the truth. That if they were satisfied from all the facts and circumstances of the case that she had not sworn truly, or that she had assented to the act, it was their duty to acquit. That in coming to a conclusion they had the right to take into consideration the conduct of the witness and all the circumstances surrounding the case."

We think the first and second grounds are without force, and that the charge of his Honor was correct. 4 Bl. Com., 213; Arch. Crim. Plead., 260.

The competency of the evidence objected to, in the prisoner's third ground, is settled in *State* v. *George*, 30 N. C., 324, and in subsequent decisions.

There was a motion in arrest of judgment, but no cause was assigned. After a careful examination of the record, we find no cause for arrest of judgment.

It must be certified to the Superior Court that there is no error in the judgment.

PER CURIAM. Ordered to be certified accordingly.

(52)

THE STATE v. HENRY BEATTY.

1. An indictment for receiving stolen goods must contain an averment of the person from whom they were received.
2. If there be a general verdict of guilty upon an indictment having two counts, judgment can not be arrested because one of those counts is bad.
3. If one of two repugnant counts is bad, a general verdict of guilty may well be supported by the other.
4. Where the joining of two counts is permitted by statute, they ought not, upon that account, to conclude against the statute.
5. Where an indictment described the article stolen (here, corn), as being the "property" of the owner, instead of being of his "goods and chattels:" *Held*, to be sufficient.

(The cases, *S. v. Ives*, 35 N. C., 338; *S. v. Miller*, 29 N. C., 275; *S. v. McCauless*, 31 N. C., 375, and *S. v. Williams*, *Id.*, 140, cited and approved.

INDICTMENT, charging in one count a larceny of "five bushels of corn, etc., the property of," etc.; in the other, that the defendant, "five bushels of corn, etc., the property of W R., feloniously did receive, knowing the same to have been stolen." Upon the trial at Mecklenburg Superior Court, Spring Term, 1866, after a verdict of guilty, there were motions for a new trial, and in arrest of judgment, which having been overruled by *Mitchell, J.*, the defendant appealed to this court.

Attorney-General, for the State.
Boyden and *Bailey*, for the defendant.

BATTLE, J. The case of *The State* v. *Ives*, 35 N. C., 338, cited by the defendant's counsel to show that the second count of the indictment is bad, is in point for that purpose. In such a count there must be an averment of the person from whom the stolen goods were received.

But notwithstanding the validity of this objection, we are unable to see any error on the record which entitles the defendant to an arrest of the judgment (53) The first count of the indictment is good, and that is sufficient. *State* v. *Miller*, 29 N. C., 275; *State* v. *McCauless*, 31 N. C., 375; *State* v. *Williams*, *Id.*, 140. The defendant's counsel admit the propriety of this, as a general rule, but contend that the present case is an exception; because on the trial they requested the Judge to instruct the jury that no verdict could be rendered on the second count, and he omitted to do so. But how does this appear? Certainly only by the bill of exceptions, and a motion in arrest of the judgment must be founded on some error apparent on the record proper.

The other objections urged by the counsel are for alleged errors that do appear on the record, and we will proceed to consider and dispose of them.

1. It is said that the two counts are inconsistent, and, that though they may, by force of a statute, be joined in the same indictment, yet a general verdict of guilty will be repugnant and void, and no judgment can be rendered on it.

The answer is, that one of the counts is bad, and the verdict and judgment may well be supported on the other. See *State* v. *Williams*, *supra*.

2. It is urged that as the two counts are permitted to be joined in the same bill of indictment, by statute, each ought to conclude *against the form of the statute*. The first count is for a larceny, which is an offence at common law, and we can not understand how it can be

made a statutable offence merely because the statute has changed the practice by allowing a cognate offence to be joined in the same bill with it.

3. It is objected to the first count that the articles stolen ought to have been charged to have been "of the goods and chattels" of the owner, instead of being his "property." Supposing this to have been a good objection at common law (which we do not admit), it would certainly be cured by our act of Assembly, which declares that no judgment shall be stayed by reason of informality or refinement, if in the bill of indict- (54) ment "sufficient matter appears to enable the court to proceed to a judgment. Rev. Code, chap. 35, sec. 14. An attempt to distinguish between the expressions "of the goods and chattels" of a person, and "the property" of that person, is too much of a refinement for practical use.

It must be certified that there is no error in the record.

PER CURIAM. Ordered to be certified accordingly.

Cited: State v. *Minton, post*, 198; *State* v. *Stroud*, 95 N. C., 632; *State* v. *Smiley*, 101 N. C., 711; *State* v. *Toole*, 106 N. C., 740.

M. W. CALDWELL, and others, v. DAVID PARKS.

A petition for a public road having been carried by appeal from the County to the Superior Court, the Judge made a decree in favor of the petitioners, and thereupon ordered a *procedendo* to issue to the County Court: *Held*, that although the latter part of this judgment was erroneous, and the court should have ordered a writ to issue from its own office, yet, inasmuch as the parties had obeyed it, and carried the case back into the County Court, the petition was thereby discontinued; and therefore, that after several years of other unsuccessful litigation in the cause had occurred in both courts, the petitioners could not resort to the judgment above mentioned, and move for an order to summon a jury, and lay out the road.

(The case of *Shoffner v. Fogleman*, 44 N. C., 280, cited and approved.)

PETITION for a public road, filed at October Term, 1856, of Mecklenburg County Court. After a judgment in that court the case was carried to the Superior Court, in which at Fall Term, 1858, another judgment in favor of the petitioners was made, *and a procedendo awarded to the County Court.* By virtue of said *procedendo* the County Court issued a writ to the sheriff, and under an *alias* thereof a report was filed at October Term, 1859, but set aside by the court. Another report was filed and set aside at April Term, 1860, and still another at October Term, 1860. From this last order an (55) appeal was taken to the Superior Court. At Fall Term, 1863, of the Superior Court, the appeal was dismissed. At January Term, 1863, of the County Court, a motion was made "to amend the record in this case by bringing it forward from October Term, 1860, and reinstating it upon the trial docket of the present term, and to order another jury to lay off said road prayed for in the petition," etc., which motion was disallowed. From this order the petitioners appealed again to the Superior Court, and at Fall Term, 1863, a *certiorari* was ordered, and the case at that term, and again at Fall Term, 1864, continued.

At Spring Term, 1866, the petitioners moved before *Mitchell, J.*, that a writ issue to lay off the road as prayed for; and such motion was disallowed. Thereupon the petitioners appealed to this court.

Boyden and *Bailey*, for the petitioners.
Wilson, for the defendants.

BATTLE, J. We concur in the opinion expressed by his Honor, that the petitioners were not entitled to have a writ issued to the sheriff, for the purpose of having a public road laid off as prayed for in their petition. The motion for the writ was founded upon the judgment given at the Fall Term of the Superior Court in the year 1858. The counsel for the petitioners have misapprehended the effect of that judgment, when taken in connection with the proceedings which were had under it.

A part of the judgment was, that a writ of *procedendo* should issue to the County Court, which was accordingly done. This was erroneous, as the Superior Court ought to have proceeded to direct a writ to be issued from its own office. *Shoffner* v. *Fogleman*, 44 N. C., 280. Erroneous though it were, no objection seems to have been made to it. On the contrary, the parties followed the cause to the County Court; pursued it for several years in that court; took it again to the (56) Superior Court by appeal, and upon its being dismissed, followed it a second time to the County Court, and brought it again to the Superior Court by another appeal. Tired of this chase, the counsel for the petitioners have gone back to that part of the judgment of Fall Term, 1858, which ordered the laying out of the public road, and have based their motion for a writ on that order. Unfortunately for them, the effect of the writ of *procedendo* was, at least, to discontinue the suit in the Superior Court. The parties were, for the time, out of the Superior Court, and if the case could have been reinstated in that court, *in statu quo*, at all, it must have been done by proceedings adopted for that very purpose. The petitioners certainly did not attain that end when they last brought the cause to the Superior Court by appeal. For that, however, they do not contend, their action being founded altogether upon the idea that the judgment, at Fall Term, 1858, is still a subsisting, valid judgment. Believing that view to be erroneous, we feel bound to affirm the order of the Superior Court.

PER CURIAM. Order affirmed.

Dist.: Turner v. *Douglass*, 72 N. C., 133; *Norwood* v. *King*, 86 N. C., 85; *Warlick* v. *Lowman*, 104 N. C., 407.

CASES AT LAW

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA.

AT RALEIGH.

JANUARY TERM, 1867.

In the matter of WILLIAM H. HUGHES.

1. In deciding questions which arise under writs of *Habeas Corpus*, the judiciary may review and control the action of the Governor in regard to points of law; but can not interfere with such action in regard to any matter within the discretion of the Governor.
2. The clause in the Constitution of the United States requiring that fugitives from justice charged with treason, felony or other crime, shall be delivered up, etc., is to be construed so as to include acts made criminal by amendments in the laws of the several States, and is not to be limited to such only as are crimes at common law.
3. Where the prisoner had already once been delivered up by the Governor for the crime in question, and thereupon, having been allowed bail, forfeited his bond, and was again a fugitive: *Held,* that it was clearly within the power of the Governor to order a second arrest and surrender.
4. The provisions in the State Constitution for the call of a Convention do not profess to extend to every case in which such a call may be required.
5. The anarchy in North Carolina, resulting from the close of the late war, having, for the time, annulled the provisions under the State Constitution for such a call, it was competent and proper for the United States to afford to the people an opportunity of electing delegates to a Convention.
6. The delegates thus assembled composed a rightful Convention of the people.

(58)

7. The authority of that Convention is not affected by the fact that some of the citizens of the State, not having been then pardoned, were not permitted to vote at the election.
8. The elections had and the officers chosen, by virtue of the ordinances of that Convention, are such, *de jure*.

HABEAS CORPUS, issuing from the Supreme Court in behalf of a prisoner, who was held by virtue of an order of the Governor, made in the course of proceedings to surrender him as a fugitive from justice in New York.

The petition for the writ, which was sworn to upon the 16th January, 1867, alleged that the petitioner was a native-born citizen, who for the last twenty years had been generally a resident of the town of Henderson; that being a merchant, and as such unfortunate in business, he had, within the last six or eight months, been sued to the courts of Granville in various suits, to the aggregate amount of about sixty thousand dollars; that within a short time past his sureties upon the bail bonds in those suits, being alarmed by hearing that he was about to be arrested and delivered up to the State of New York, surrendered him into the custody of the Sheriff of Granville County, who thereupon committed him to the common jail of the county until the 12th of January instant, when he was taken by the sheriff and brought to Raleigh, to be delivered, according to requisition, to an agent of the Governor of New York for the purpose of being carried to that State for trial upon an alleged offence against its laws; that the warrant of Governor Worth was issued improvidently, "without proper charge of such an offence, or by such proofs as are required by the Constitution or laws of the United States" in such cases, especially because in the month of May, 1866, he had been delivered up by Governor Worth upon the same accusation, and been carried to New York, where under it he was kept in prison between four and five months, and never brought to trial, but was finally enlarged, to go whither he would, (59) by the proper judicial authority of that State, and that, without fleeing, he peacefully returned to his home; that he was no fugitive from justice, and that the pretended prosecution in New York was not in vindication of public justice, but to enforce, from the petitioner or his friends, the payment of alleged debts, which he has no means of discharging; that the Sheriff of Granville County had no reason for detaining him, except under the surrender of his bail, and that such surrender did not authorize him to be brought out of that county; and that under the circumstances the warrant of Governor Worth was void, etc. It concluded by praying for a writ, to be directed to the Sheriff of Granville County, etc.

The writ having been ordered to issue, and having been served upon the sheriff, he made an elaborate return upon the 16th of January, setting forth for cause of the caption and detention of the petitioner; that on the 12th of January his bail (as above) had surrendered him in discharge of themselves, and also that he, the sheriff, from neglect to take bail under certain writs, had himself incurred the liability of special bail for him, and that, being under this liability, he arrested the petitioner on the 11th January, 1867, and held and still holds him to answer to said suits; for further return, that upon the 11th of January, 1867, a warrant issued from the Governor of the State commanding the petitioner's arrest, and that since the delivery of this warrant he had also been detained by virtue of that.

Appended to this return was a list of fifty-eight suits for debt, pending against the petitioner in the courts of Granville County.

There was also appended a warrant from the Governor, dated 11th January, 1867, directed to all and singular the sheriffs and constables of the State, commanding them to arrest William H. Hughes, and to (60) deliver him to "James P. Bennet, the agent of the State of New York, to be by him taken," etc., etc. This warrant recited:

1. A requisition by the Governor of New York for the petitioner, as charged there with "the crime of obtaining goods by false pretences," dated 15th May, 1866.

2. A former warrant of the Governor of this State, directing the arrest and surrender of the petitioner in accordance with the above requisition, dated 31st May, 1866.

3. A second requisition from the Governor of New York, for the same crime.

4. A certificate from the office of the District Attorney for the city of New York, addressed to the Governor of New York, approving of an application to him for a requisition for the petitioner, assigning reasons for such approval, and recommending James P. Bennet as a proper person to convey the requisition, he being without "private interest in the arrest of the fugitive."

5. A copy of the indictment against the petitioner, found by the jurors, etc., of the city and county of New York, charging "that with intent feloniously to cheat and defraud Henry M. Stevens," etc., he did feloniously pretend and represent to said Stevens "that he resided at Norfolk, in the State of Virginia, and he was then and there doing business," etc., "and that he was the owner of twenty-eight bales of cotton which were then and there in a vessel on its way to New York, consigned to Blossom & Brothers, merchants of said city," believing which "false pretences" Stevens delivered to him certain articles, etc. This indictment was indorsed, "Filed 22d March, 1866."

6. An affidavit of one George E. Ames, dated 19th December, 1866, at Albany, and stating that the above indictment had been found and was still pending, and that Hughes, who had once been delivered up by the Governor of North Carolina, and who, upon his arraignment in New York for the crime had pleaded "Not Guilty," had thereafter been admitted to bail in (61) the sum of $1,500, and having forfeited his bond, was believed to be a fugitive from justice at Henderson, in North Carolina.

Graham and *Harris*, for the petitioner
Bragg, *contra*.

1. The reference of Mr. Graham to our Act of 1797 (Laws of North Carolina, 1170-'71, Rev. Sat., chap. 35, sec. 5; Rev. Code, chap. 35, sec. 5), as fixing the meaning of the word "crime" in the Constitution of the United States, has no application to this case. That is a matter of judicial construction which the Legislature

had no power to make, and it is intended merely to provide by State law for the arrest of criminals escaping from other States.

The same may be said of citations from Wheaton's International Law as to the rendition of fugitives from justice. That is usually regulated by treaty stipulations, and if none, is purely a matter of comity between nations, and not obligatory.

2. Such would have been the case between the States of this Union, had they not formed a government, and provided by their Constitution, Art. 4, sec. 2, that "a person charged with treason, felony or other crime, who shall flee, etc., shall, on demand, etc , be delivered up, to be removed to the State having jurisdiction of the crime." There was a similar provision in the Articles of Confederation, the words being, "treason, felony, *or other high misdemeanor.*" See Hurd on Ha. Cor., 593; Mr. Madison's explanation of the change to words, "or other crime."

3. To carry out this provision of the Constitution, Congress passed the Act of 1793. (Brightly's Dig., 293.) The requisites of that act being complied with by the Governor of New York, nothing was left to the Governor of this State but to issue his warrant.

(62) 4. It is well settled, though sometimes disregarded in some of the States, that in ascertaining the meaning of the words in the Constitution, "or other crime," we are to look not to the law of the State upon which the demand is made, or even to the common law, or law in existence when the Constitution was made, but to the law of the State when and where the crime is alleged to have been committed. Hurd on H. C., 597–599. Matter of *Clark*, 9 Wend., 212.

5. It is insisted for the petitioner that the offence with which he is charged is not a "crime," and therefore that the Governor of this State had no right to surrender him.

The grade of the offence depends upon the Statute of New York, and it is charged in the bill of indictment accompanying the demand to have been "feloniously" done. This court can not properly look beyond the requisition and the accompanying record, and must decide from that alone. Matter of *Clark*, 9 Wend., 212, *State* v. *Buzine*, 4 Harring (Del.), 572; *State* v. *Sehlem*, *Ibid*, 577. In the first named case, while the court would not judicially look at the Statute of Rhode Island, which was read informally, and from which it appeared that the offence charged was punishable by fine only, they nevertheless held that such an offence was a crime, within the Constitution.

The grade of offence, and whether coming within the Constitution, was a matter to be decided by the Governor of this State, and can not be reviewed on *Habeas Corpus* by the courts. Hurd on H. C., 616 to 618.

6. But whatever difference of opinion or authority there may be as to ordinary misdemeanors, not punishable with degrading punishment, being within the purview of the word "crime" in the Constitution, the Statute of New York having been read to the court, shows that the offence charged is punishable by imprisonment in the penitentiary, and offences so punished
are crimes. (See letter of Ch. J. of this court to
(63) Gov. Worth, June 21, 1866.) Hurd on H. C.,
602-'3.

7. It is said that the allegations in the indictment upon which the demand is made for surrender, do not make a case of obtaining goods by false pretences, under the Statute of New York.

Numerous cases decided in that State show to the contrary.

(After the argument, the court, desiring to see some of such cases, were referred to the following:

2 Wheeler's Crim. Ca., 161; *People* v. *Haynes*, 11 Wend., 557, and cases reported; 12 John., 292; 9 Wend., 190; 11 Wend., 18; 13 Wend., 311; 14 Wend., 31 and 546; 1 Hill, 317.)

8. It is said the petitioner, having been once surrendered by the Governor of this State upon this charge, was taken to New York, and there gave bail; and though he forfeited his bail, yet as he was allowed to leave

the State of New York, that State can only exact the forfeiture of his recognizance, which operates as a satisfaction to the State, and that, legally speaking, he is not a fugitive from justice, and can not be legally surrendered a second time upon the same charge.

The error of this is so palpable as hardly to admit of argument.

In bailable offences the forfeiture of the recognizance for appearance is no satisfaction to the State for the offence; the defendant is not discharged, he may be again arrested and brought to trial. By bail he is merely discharged from imprisonment and for the time being. He does not go without day, but until a day certain, when he is to appear. If he do not, and escapes to another State, he may be re-demanded; and if surrendered, and he gives bail again and leaves the State, and does not appear as he has bound himself to do, he is a fugitive from justice, and may be properly demanded, *toties quoties* he fails to appear.

(64) 9. It is further said, that the petitioner having been sued for debt in sundry cases, as appears from the return, and being now in the custody of the Sheriff of Granville for want of bail, and having been surrendered to him in other like cases by his bail, before the warrant of the Governor of this State came to his hands, his creditors have a prior and better claim to retain him here.

But little authority can be found upon the subject. In the matter of *Troutman*, 4th Zabr., 634, the only case found, a single Judge in the State of New Jersey, held that he could not, in such case, be surrendered until the claim of the creditor was discharged.

That case is not sustainable on principle. The claim of the State of New York is under the Constitution and laws of the United States. The demand is to answer the ends of public justice, a matter paramount to the claims of private creditors. Public policy, aside from the positive requirements of the Constitution and law, requires that such private claims shall be subordinated to those of a State, made in furtherance of public justice. In connection with this see *Granberry* v. *Pool*, 14 N. C., 155.

Moore, for the Sheriff of Granville.

PEARSON, C. J. At June Term, 1866, upon the request of Governor Worth, the Judges of this court certified to him an opinion in these words:

RALEIGH, June 21, 1866.

His Excellency GOVERNOR WORTH:

In reply to your communication of the 20th instant, I have the honor to say the Judges concur in the opinion that the word "Crime," in the act of Congress to which you refer, embraces all offences against the public of an aggravated or infamous character, as contradistinguished from trivial offences to which (65) the milder term "misdemeanor" is applied. The dividing line is not plainly marked in the books, and to convey the meaning we must resort to instances. An assault with intent to commit felony, a conspiracy, cheating with false tokens, are "crimes." An ordinary assault and battery, retailing without license, are misdemeanors.

In determining what is a crime, it is proper to be governed by the laws of the State in which the offence is alleged to have been committed.

The grade of offence may be considerd as marked by the punishment. If it be infamous or degrading, as the jail or penitentiary, the offence is a crime, and properly associated with "treason" and "felony." If the punishment be only a fine, the offence is a misdemeanor, and is excluded from the operation of the act of Congress by the words "treason and felony." "*Noscitur a sociis.*"

(Signed) R M. PEARSON,
Chief Justice N. C.

The opinion covers almost the whole ground. It was properly conceded on the argument by Mr. Bragg, that in regard to points of law the court has power, as a coordinate branch of the government, to review and control the action of the Governor under a writ of *Habeas Corpus.* On the other hand it was conceded by Mr. Graham that, in regard to any matter within the discretion of the Governor, the court had no right to interfere.

It was urged by Mr. Graham, 1st, that cheating by false pretence, as distinguished from false token, was not a crime at Common Law, and was made a crime by statute in the State of New York after the adoption of the Constitution of the United States, and consequently is not embraced by the word "crime" as used in that instrument.

It may be that in the construction of a treaty (66) between independent nations, where a particular offence is specified, "forgery" for instance, as in Windsor's case, cited in Wheaton Int. Law, 117, it was well decided that what was or was not "forgery" depended on the state of the law at the date of the treaty, and that a statute passed afterwards making "a false entry, by a clerk in bank," forgery, was not embraced by the treaty. Ours is a different case. We are not putting a construction upon a treaty between independent nations; we are putting a construction upon a Constitution "adopted by the people of the United States in order to form a more perfect union, establish justice," etc. In this instrument we find a provision that any person charged with treason, felony or other crime, shall be delivered up, etc. The words are general; no specific offence, as forgery, is named, and, in the very nature of things, this being a part of the fundamental law of the United States, has reference to such changes in the Criminal Law as might thereafter be made in any State in the Union; so the position that a rule of construction which may have been properly applied to a treaty, is applicable to the Constitution of the United States, is untenable. The clause under consideration should be construed, in connection with the clause immediately preceding, "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States," and, as by the one, a citizen of North Carolina going to the State of New York is entitled to all the privileges of a citizen of that State, it is plainly the meaning of the other to subject him to punishment for violating its criminal law, as if he were a citizen of that State, and to take away all chance of *dodging behind State lines.* It is clear that the facts set out by the indictment in his case constitute a crime according to the statute of New York, as construed by the courts of that State.

2. It was argued in the second place that, as the prisoner had been heretofore delivered up by (67) Governor Worth, and was allowed to leave the State of New York, upon entering into a recognizance for his appearance, the Governor had no power to order his arrest a second time, either on the ground that his power having been once executed had spent its force, or on the ground that a forfeiture of the recognizance was an atonement for the offence. Neither of these positions can be maintained. It may be that had the prisoner been discharged for want of prosecution, it would be in the discretion of the Governor to refuse to order his arrest a second time; but where a recognizance is taken, and the prisoner fails to appear, the power of the Governor to order a second arrest can not be questioned. The suggestion that a forfeited recognizance is to be treated as an atonement for the offence, does not admit of discussion.

It follows that the prisoner must be remanded, provided Jonathan Worth is rightfully filling the office of Governor of the State of North Carolina. That point was not made on the argument, but as the objection has been gravely urged elsewhere, a decent regard for public opinion makes it proper to state the grounds on which it is believed that the offices of the State are rightfully filled. See *State* v. *Lane*, 26 N. C., 434.

The whole matter depends upon the question, Was the Convention of 1865 a rightful Convention for the purpose of reorganizing the State government, or was it an "unlawful assembly?"

1. It is said that the President had no power to cause measures to be adopted for calling the Convention, and that his act was one of usurpation and in violation of the Constitution of the State.

It is provided by the Constitution of the State, Art. 4, sec. 1, "No Convention of the people shall be called by the General Assembly, unless by the concurrence of two-thirds of all the members of each House."

The Convention was not called in pursuance of this provision; and it may be conceded that if the (68) Convention had been called prior to the revolt and surrender, it would have been an "unlawful assembly"; but the Convention was not called until after the State had revolted and been subjugated. This makes the difference.

The Convention was not in pursuance of the Constitution of the State, nor was it in violation of that instrument. It was neither constitutional nor unconstitutional, but *extra*-constitutional; that is, it met at a time and under circumstances not provided for by the Constitution. It was the creature of the emergency—the only mode by which it was possible to extricate the State from the condition of anarchy into which it had fallen, by the attempt to withdraw from the Union, which resulted in subjugation.

The frame of the government of the State still existed; there was the machinery, but no hands to work it; there were the offices, but no officers qualified to discharge the duties. Those officers who held during good behaviour had been required to renounce their allegiance to the government of the United States and to take an oath to support the government of the Confederate States. Such officers as had been elected or appointed, after the revolt, were required to take a like oath. It is provided by the Constitution of the United States, Art. 6, clause 3, "The Senators and Representatives before mentioned, and the members of the several State Legislatures, and all Executive and Judicial officers, both of the United States and the several States, shall be bound by oath to support this Constitution." No one of the State officers was bound by an oath to support the Constitution of the United States, and consequently no one of them was qualified to discharge the duties of their respective offices. There was no Governor, no members of the General Assembly, no Judges. Every officer in the State was politically dead, and the effect the same as if they had all died a natural death. How could the government of the United States (69) recognize, as rightful officers of the State men who were not bound by the oath required by the Constitution, but on the other hand were bound by an oath to support another government, and who had been elected or inducted into office at a time when the State was in open war with the United States?

Here, then, was a state of anarchy. No Convention could be called by the General Assembly, for there were no persons qualified to act as members of the General Assembly, and there was no way to have the State offices filled, whether Executive, Legislative or Judicial, except by a Convention of the people. In this condition of things, so far from its being a matter of complaint, it was fortunate that the President of the United States, either as President under the Constitution, or as Commander-in-Chief of the conquering army, under the law of nations, had power, without reference to the Constitution of the State, to appoint a Provisional Governor, and, through his instrumentality, so to provide that the people of the State might, in a quiet and orderly manner, elect delegates to a Convention, and thereby give the wheels of the State government a new start.

If we consider the State, after the revolt and surrender, in the condition of an independent nation that had been conquered (and this is the most favorable light in which the subject can be viewed, for thereby the question is relieved from the imputation of treason), a well settled principle of the law of nations makes it the duty of the conquering nation to take care that the people conquered shall be provided with laws, or shall be allowed to provide themsleves with laws, and thereby prevent a state of anarchy.

The act of the President, so far from being a usurpation, was a discharge of this duty in its mildest form; and the people of the State did accordingly avail themselves of the opportunity thus presented, and did elect delegates to the Convention; it follows that their assembly was a rightful Convention of the people.

(70) 2. It is said, in the second place, assuming that the Government of the United States had power to adopt the necessary measures to enable the people of the State, in a quiet and orderly manner, to elect delegates to a Convention, the act of the President excluding a portion of our best citizens from the right to vote for, and be eligible as, delegates, was in violation of our fundamental law, and such an act of despotism as to make the Convention an unlawful assembly, and the whole proceeding void and of no force.

Here again the same fatal error underlies the whole train of reasoning. It is strange that heated feeling could, in so short a time, divest the mind of all impression of the stern fact, that after a bloody war, the State had surrendered without stipulating for terms (there being no terms except that the soldiers were allowed to go home unmolested) and lay prostrate with no further power of resistance, her people taking the amnesty oath, suing for pardon, and asking in the name of humanity, and the principles recognized by the law of nations, to be saved from the horrors of anarchy!

We were not in a condition to invoke the aid of "our fundamental laws"—the proceeding was avowedly extra-constitutional, and we could appeal only to the laws of nations. Whether the portion thus excluded constituted the best or the worst of our citizens, and whether the number excluded amounted to 100 or 500, does not affect the principle, and such extraneous circumstances should be put out of view.

We have then this state of facts: After a surrender without stipulating for terms, the United States Government undertakes, in discharging the duty imposed by the law of nations, to relieve our citizens from a state of anarchy; and to this end it seemed good to the Government of the United States to permit the people of the State to elect delegates to a Convention, but to exclude from the privilege of voting for, and being eligible as delegates, those citizens, who, having (71) participated in the war, had not obtained pardon. The question is, was this exclusion a violation of the law of nations, and an act of despotism?

We have seen that, according to the law of nations, the conquering nation may either impose such laws as to it seems fit, or may allow the citizens of the conquered nation the privilege of framing laws for itself. Can any principle be suggested, which forbids the conquering nation, in adopting this latter and milder course, to exclude from this privilege those citizens whom it deems dangerous and not fit to be trusted? In other words, does the fact that a portion of the citizens are not considered fit to be trusted, impose upon the conqueror the alternative, either to adopt the harsher course of imposing such laws as he sees fit, or to wait until such time as he can be assured that all of the citizens have become fit to be trusted, and in the meantime keep the conquered country under military law, or leave it in a state of anarchy? If this were so, it would be in the power of a handful of men, who chose to hold out in opposition, after the nation is subjugated and the country in possession of the conqueror, to force him to impose such laws as he sees fit, or else to continue his military rule or leave the country in anarchy. If the conqueror has, by the law of nations, a right to impose such laws as he deems fit, why may he not confer the privilege of framing the laws upon such portion of the citizens as in his opinion are worthy of the trust? The greater includes the less, and upon what ground can those whom he deems unworthy of the trust complain that the privilege is not also conferred on them? A naked statement is sufficient to dispose of the question, and it is almost too plain to talk about, when we bear in mind that it must be judged of by the law of nations, and that we are not in a condition to restrict the will of the conqueror by invoking our fundamental law. Take the most recent application of the law of nations. Hanover is deprived of its King and of its government and (72) laws, and annexed to Prussia, for such is the will of the conqueror; and this is done according to the law of nations. Can we look to that law for a principle by which to restrict the conqueror, if he sees fit to adopt the milder course, and *put him under an obligation* not to exclude any portion of our citizens from the privilege of participating in framing the laws?

It is true, should a conqueror, while professing to allow the citizens the privilege of framing laws for themselves, exclude the greater part of them and confine it to a few who may be deemed tools of his, it would detract from the magnanimity of the act, and be, in effect, the same as if he had imposed such laws as he saw fit. There is no ground to support a suggestion of the kind in this case, and even if there was, it could not affect the principle.

3. Fratricide is a more heinous crime than the killing of one with whom there is no tie of kindred. Civil war is more aggravated than a war with a foreign nation, and the conclusion in favor of the power of the United States, and the manner of its exercise, receives additional support by taking into view the fact that our State is not an independent nation, but is a member of the Union, and the attempt to withdraw, and the war consequent thereon, was a revolt, and subjected our citizens who participated in it to the charge of treason, unless the State *had a right to secede.* That question we must suppose to have been settled by the result of the war. So the Government of the United States, in discharging the duty imposed upon it by the law of nations, and the provision of the Constitution which requires it to guarantee to every State a republican form of government, was fully warranted in considering those individuals, who had not been pardoned, as still disaffected, and not worthy to be trusted in the

work of reorganizing the State government. Ours is a complicated form of government; the citizen takes two oaths of allegiance, one to the Government of (73) the State, the other to the Government of the United States, and both governments *act directly upon the individual.* So, when the State attempted to withdraw, and revolted, a condition of things was presented which was not provided for in either Constitution, and seems not to have been contemplated by the framers. The citizens were obliged to violate their allegiance either to the one government or the other. Those who made their election to adhere to the State violated their allegiance to the United States, and those who elected to adhere to the United States violated their allegiance to the State. Although this unforeseen condition of things, which forced upon us the necessity of violating our allegiance to the one government or the other, can not be deemed a justification of such of our citizens as elected to adhere to the State (except upon the assumption that the State had a right to secede), yet it is certainly a mitigation of the wrong; and to this it is ascribed, in a great measure, the proclamation of general amnesty, and the liberality with which pardon has been granted, to such as fell in the excepted classes. A portion of our citizens had not obtained pardons. Did this fact put the Government of the United States to the alternative of waiting until such time as all of these persons should approve themselves fit persons for pardon, and, in the meantime, continue the military occupation of the State, or leave it in a condition of anarchy, without legislative, judicial or executive officers, or else to allow those who, being unpardoned, were looked upon by the Government of the United States as traitors, to participate in forming a Convention for the purpose of providing measures to fill the State offices?

It seems to us very clear that the exclusion of these persons was not a violation of the law of nations, or the clause of the Constitution above referred to, and that, so far from the act of the President being one of

usurpation and despotism, he could not consist-
(74) ently have done otherwise. These persons either
had applied for pardons which were refused, for reasons of which he was the sole judge, or else had omitted to apply, because they were unwilling to take the oath of allegiance to the United States, or because they persisted in the opinion that they had committed no act which needed a pardon.

Suppose the President had caused these persons to be arrested, and they were confined on the day of election, and thus practically excluded from voting and acting as delegates to the Convention, would that fact have put it out of the power of the President to enable the people to hold a Convention? No one will so contend; and yet their exclusion by the proclamation was the same in effect, saving the omission of the harsher part, that is the arrest and confinement, which occurred in only one instance. So, to urge the exclusion of this handful of unpardoned traitors, as the Government of the United States considered them, as a ground for holding the Convention to be an unlawful assembly, and as a consequence that the State has had, and still has, no Governor, members of the Legislature, Judges or other officers, who can rightfully fill their respective offices, is "to trifle with a grave subject."

4. Whether the act of the President was one which required the concurrence of Congress, is a question into which we need not enter; for, taking it to be so, Congress has, in many ways, recognized and confirmed the action of the President in regard to the re-organization of the State government by filling its offices. No other need be referred to than the joint resolution by which certain amendments to the Constitution of the United States are proposed to the Legislature of the State of North Carolina, for adoption or rejection, thereby recognizing the Legislature as a lawful body, and, of course, recognizing in like manner the Convention under whose authority the members of the Legislature were
elected. Indeed, although there may be some
(75) diversity of opinion upon the question as to the

power of the President, without the concurrence of Congress, to enable the people of the State to take measures by which to resume a Constitutional relation as one of the States of the Union (about which we wish to intimate no opinion, because it is not involved in the matter under consideration), there would seem to be no doubt as to the power of the Executive, either as President or as commander of the army, to appoint a Provisional Governor, and through his instrumentality enable the people of the State to meet in Convention and take measures to fill the State offices. We have seen that, according to the law of nations, it is not only the right, but the duty, of the conquering nation either to impose a government on the conquered people, or to allow them to frame one for themselves, so as to prevent a condition of anarchy. When the President entered upon the discharge of this duty, it surely was not for the conquered people to question his powers, and the mere non interference of the legislative branch of the government was such an acquiescence as to amount to a sanction, on its part, of all acts which, by the law of nations, it was the duty of the conquering nation either to do or to allow to be done.

At all events it seems to us entirely clear that the officers of the State, who have been by this means and in this manner chosen and inducted into office, have rightful jurisdiction and power to discharge the duties of their respective offices, until some other provision shall be made for the government of the people.

5. We do not enter upon the question in regard to the extent of the power of the Convention, for it is certain that, if rightfully convened, it had power to adopt all measures necessary and proper for filling the offices of the State, which is the only question now under consideration.

It is considered that the prisoner be remanded.

PER CURIAM. Prisoner remanded.

Cited: Cook v. *Cook*, *post*, 587; *Wiley* v. *Worth*, *post*, 174; *Buie* v. *Barker*, 63 N. C., 137; *In re. Sultan*, 115 N. C., 62; Appendix, 64 N. C., 786.

(76)

THE STATE v. J. Z. BELL.

1. A retrospective law, taxing the business of citizens during the whole of the current year in which such law is passed, is not unconstitutional.

2. A law punishing a prospective refusal to render for taxation an account of business done before the passage of the law, is not *ex post facto.*

3. It was competent for the State, in October, 1865, to pass a law taxing business done at any time during that year, at any place within its boundaries, even although within what were called "the Federal lines," and at places where there were then no civil officers.

4. The functions of a court in respect to statutes are but two: 1st, to ascertain their meaning; and, 2d, to decide upon their constitutionality.

5. Except as restrained by the laws of the United States, and the Constitution of the State, the taxing power of the State extends to all objects within its territory, and has no limitation except in the responsibility of the representative to his constituents.

6. A tax upon the past business of the current year is not "a capitation tax."

7. Persons licensed under the revenue laws of the United States, are not thereby "officers" of the United States, or withdrawn from the operation of the taxing powers of a State.

8. The occupation, during the late war, of parts of the State by the forces of the United States, can not be regarded as an occupation by a "public enemy."

9. The ordinance of the 1st October, 1865, entitled: "An ordinance to provide revenue," etc., in some sections, operates retrospectively for the whole of that year; such operation is valid, and binds persons even during such time within that year as they did business in places "within the Federal lines."

(*State v. Bond*, 49 N. C., 9; *Dickinson v. Dickinson*, 7 N C., 327; *State v. Pool*, 27 N. C., 105; *State v. Petway*, 55 N. C., 396; *Murchison v. McNeill*, 60 N. C., 217, and *Gardner v. Hall, ante*, p. 21, cited and approved.)

MISDEMEANOR, tried before *Warren, J.*, at Spring Term, 1866, of the Superior Court of Carteret.

The facts were, that the defendant was a merchant, doing business in the town of Beaufort, from 1862 to 1866, and that he dealt in flour, sugar, coffee, spirituous

liquors and tobacco; buying and selling these articles both before and after the 18th of October, 1865;
(77) that in January, 1866, the Sheriff of Carteret County demanded of him a statement under oath of the amount of taxes due from him under the ordinance of the Convention, passed the 18th of October, 1865, which he refused to give, offering, at the same time, to account for and pay what might be due after the 18th of October. The sheriff refused to accept of this, and the defendant was bound over to court; also, that the defendant, before May, 1865, had been licensed to trade by the supervising special agent of the Treasury Department of the United States, and had paid a tax of 1 per cent upon his purchases to the military authorities of the United States, then occupying Carteret County, and that he supplied the army and the country within the Federal lines; that by order of the Treasury this system was discontinued in May, 1865, and thereafter, during that year, the defendant paid the "internal revenue" tax imposed by act of Congress, and continued to trade under a license from said supervising agent; that there were no court officers in that county exercising functions prior to the organization of the Provisional Government in North Carolina.

His Honor charged the jury, that if they believed the evidence, the defendant was guilty.

Verdict, *Guilty*. Rule for new trial. Rule discharged. Judgment and appeal.

Manly and *Haughton*, for the appellants.
Phillips & Battle, for the State.

1. Ordinance is retroactive, sec. 1, 15, 18.

2. In part such retroaction is by way of lessening the tax imposed. The Revenue Act of 1864–'65, or, waiving all acts during the war, that of 1860–'61, taxed, for instance, "liquors" 4 and 8 per cent, this ordinance, 2 per cent. The defendant refused to account, even for *liquors, at any time* before the 18th October. But
(78) for the ordinance he would have had to pay by some preceding Revenue law, the tax in which

would have been heavier. He therefore has no excuse under *retrospective* laws or *Federal lines.* The indictment is maintainable, if he refused improperly any one item for any one day.

Supposing, however, as is probable, that the court shall disregard niceties upon a matter of so much public interest; then,

3. Whether it were politic to lay this tax was simply a legislative question, and has been decided. This court has but two duties in relation to statutes questioned before it: (1) to ascertain their meaning; (2) to test their constitutionality. Opinion of the Judges, 7 Mass., 523. Relief against offensive constitutional tax laws can be had only by an appeal to the taxpayers at the ballot box. *People* v. *Brooklyn*, 4 Coms., 419.

4. Retroactive statutes are either (1) *ex post facto* laws; (2) laws impairing the obligation of contracts; (3) such as do not belong to either of the two former classes. Consideration of the second class may be laid aside. This law is not *ex post facto*, for the act which it renders criminal is one to be performed *in the future.* Retroactive statutes of the third class are not unconstitutional, either under the State or the Federal Constitution. The only limitation on taxation in the State Constitution does not apply here. *Murchison* v. *McNeill*, 60 N. C., 217. As regards the application of the Constitution of the United States, see in general the doctrines in *Providence Bank* v. *Billings*, 4 Pet., 561, and cases there cited. Retrospective tax acts, so far as regards the business of the current year, have been common in North Carolina. See Revenue Acts of 1848, secs. 1 and 2; 1850, secs. 4 and 5; 1854, secs. 19, 20, 22, 24; 1856, secs. 19, 20, 24, 30. See also, for similar taxation, the Federal tax acts, in Stats. at Large, vol. 12, page 309, sec. 49; page 424, sec. 91; page 311, sec. 52, and page 445, sec. 37.

(79) 5. This law may operate upon business done anywhere within the bounds of the State during any part of the year. The judicial department of the present government of North Carolina can not regard

such objects of taxation as were at any time "within the Federal lines" as beyond its jurisdiction. This government might possibly take the *vice versa* view, and say that it would not, or ought not to, tax citizens for business done, say in March, 1865, outside of those lines, on the ground that at such time the United States, part of whose machinery, in one sense, the State as now organized is, could not then give the business in question its protection. *The U. S.* v. *Rice*, 4 Wheat., 246, presented only a question of construction, and has no application here where the question is as to power, and not as to meaning.

6. Licenses under the revenue or other laws of the United States are not thereby exempted from State taxation. Licenses are merely a method of collecting taxes, or of excluding improper persons from a particular business. A license by the United States imports no more than the removal of one obstruction, a dispensing with one prohibition upon the business in question; and does not guarantee immunity from all obstructions. Licensees are not "officers," or a part of the political machinery of the United States, any more than other citizens are who pay customs or land taxes. A licensed sutler is no more an officer of the United States than a retailer of spirituous liquors by the small measure is an officer of North Carolina. See case of Salary of a Clerk in a Post-office, *Metcher* v. *Boston*, 9 Met., 73, distinguished from *Dobbin's case*, 16 Pet., 435. Nor are the military deserts of such of these persons as followed the armies very generally recognized, or rated at a very high figure.

BATTLE, J. This case was argued before us at the last term of the court, but as the questions presented in it were found to be novel, as well as important, we deemed it proper to take time for (80) deliberation, and to request another argument. It has accordingly been again discussed, with much zeal and ability, by the counsel on both sides, and we are now prepared to state the reasons which have conducted us to the conclusion at which we have arrived.

The indictment against the defendant is founded upon an ordinance of the Convention of 1865, which was ratified on the 18th day of October in that year, and is entitled, "An ordinance to provide revenue for the year eighteen hundred and sixty-five." By the nineteenth section a tax is imposed of one-half of 1 per cent on the amount of all purchases made in or out of the State, whether for cash or on credit, by any merchant, etc., buying or selling goods, wares or merchandise of whatever name or description: *Provided, however*, that purchases of cotton, tobacco, turpentine, rosin, tar and spirituous liquors, wine and cordials, shall not be included in the amount of purchases on which the tax laid by this section is to be estimated." This tax, by the first section, was to apply and operate during the twelve months next preceding the 1st of January, 1866. By the twenty-first section it is provided that "to ascertain the amount of taxes due from any person, company, firm or corporation, the sheriff or his deputy is hereby authorized and empowered to examine on oath any person, etc.; and in case any such person shall refuse fully to answer on oath such person shall be deemed guilty of a misdemeanor, and said sheriff or deputy sheriff shall commit him to prison unless he shall enter into recognizance, with good security in such sum as shall be required, to appear before the Superior Court of law of his county, at its next term, to answer the charge, and on conviction he shall be fined or imprisoned, at the discretion of the court." The defendant, who was a citizen of the county of Carteret, and had carried on the business of a merchant in that county by buying and selling goods, wares and merchandise during the whole of the year 1865, refused (81) to take the oath required by the ordinance, but offered to swear to the amount of his purchases *after the 18th day of October, 1865*, that being the day on which the ordinance was ratified. To this proposition the sheriff refused to accede, and proceeded to bind him over to the next Superior Court of law for the county, at which court he was indicted, tried and convicted for a violation of the ordinance; and from the judgment then pronounced against him he has appealed to this court.

On the argument here the counsel for the defendant contends that the ordinance of the Convention, under which his client was convicted, is unconstitutional and void:

1. Because it is an "*ex post facto* law," and therefore prohibited by the Constitution of the United States. Art. 1, sec. 10, chap. 1. It becomes necessary, then, to inquire what is such a law? That question was answered and settled by the Supreme Court of the United States in the case of *Calder* v. *Bull*, 3 Dallas, 386, in which it was defined to be as follows: "(1) Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. (2) Every law that aggravates a crime or makes it greater than it was before it was committed. (3) Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when it was committed. (4) Every law that alters the legal rules of evidence and receives less or different testimony than the law required at the time of the commission of the offence, in order to convict the offender." This definition, thus given by *Judge Chase* in pronouncing the opinion of the court, has been universally accepted and approved, and it shows that an *ex post facto* law, in the sense in which it is used in the Constitution, applies to matters of a criminal nature, and to them only. 1 Kent, 409; 3 Story on the Con., 212; *State* v. *Bond*, 49 N. C., 9.
(82) The twenty-fourth section of our Bill of Rights has received a similar construction. *Dickinson* v. *Dickinson*, 7 N. C., 327. Tried by the test of this definition, the ordinance of the Convention is not in the slightest degree obnoxious to censure. It does not declare criminal any action done by the defendant before it was passed; nor does it aggravate the crimi-

nality of any act which he had previously committed; nor does it change or increase the punishment for any alleged crime, nor change the rules of evidence to make a conviction easier. On the contrary, it recognizes the defendant as having been engaged in a lawful business, and upon that business proposes to lay a tax. What it declares to be a crime is something which he may do or refuse to do afterwards, and in respect to such criminality it is altogether prospective. If he were not bound to render an account on oath of his purchases, as a merchant, prior to the passage of the ordinance, it must therefore be for some other cause than that the ordinance is *ex post facto.*

2. Upon the supposition that his first objection might not be sustained, the counsel contends, in the second place, that if the ordinance be not *ex post facto*, it is *retrospective*, and therefore void, as being against the spirit, if not the letter, of the Constitution. For this position the counsel has referred to and relies upon what is said in "Dwarris on Statutes." It is a general rule, say the books, that no statute is to have retrospect beyond the time of its commencement, for the rule and law of parliament is, *nova constitutio futuris formam debet imponere non prœteritis.* And not only is it the doctrine of the English law that a statute is not to have a retrospective effect, but it is also founded on the principles of general jurisprudence. A retrospective statute would partake in its character of an *ex post facto* law as to all cases of crimes and penalties, and in matters relating to contracts or property, would violate every sound principle. Dwar. on Stat., 680, 681 (9 Law
(83) Lib., 35). Whenever a retrospective statute applies to crimes and penalties, it is an *ex post facto* law, and as such is prohibited by the Constitution of the United States, not only to the States, as we have already seen, but to Congress. Art 1, sec. 9, chap. 3. The omission of any such prohibition in the Constitution of the United States, and also of the State, is a strong argument to show that retrospective laws, merely as such, were not intended to be forbidden. It furnishes an in-

stance for the application of the maxim *expressio unius est exclusio alterius.* We know that retrospective statutes have been enforced in our courts, of which the case of the *State* v. *Pool*, 27 N. C., 105, furnishes a striking example. In that case it was decided that a bond given by a sheriff for the discharge of his official duties, though void according to the previous decisions of the Supreme Court, because those who had accepted it had, at the time, no legal authority to do so, yet will become valid *ab initio* from a subsequent act of the Legislature, declaring that such bonds should be considered as having been legally delivered. And this consequence will follow, although the act of Assembly was passed not only subsequently to the institution of the action, but also to the determination in the court below, and the appeal to the Supreme Court. In the argument of the case, it has been contended that the act ought to be construed so as to extend only to bonds subsequently executed; but in delivering the opinion of the court, it was said that though statutes ought not to be adjudged retrospective except from necessity, yet the words "have been taken," as applied to the bonds of sheriffs, could not be so interpreted as to render them inoperative. It follows from this that whenever the Legislature uses language which is expressly, or by necessary construction retrospective, effect must be given to it by the court, unless there be some other ground upon which it must be declared void. There can be no other ground except its repugnancy to the Constitution of the (84) United States or of the State, for it was well said by the learned counsel who argued for the State, that there can be but two questions raised upon an act of the Legislature. First, is it constitutional? Second, what is its proper construction? In connection with this, the language of the Judges of the Supreme Court of Massachusetts, in reply to questions propounded to them by the House of Representatives of that State, is of grave import, and deserves the serious consideration of every citizen of the country: "The Constitution is law, the people having been the legislators, and the several statutes of the commonwealth, enacted pursuant to the Constitution, are law, the Senators and Representatives being the legislators. But the provisions of the Constitution, and of every statute, are the intentions of the Legislature thereby manifested. These intentions are to be ascertained by reasonable construction, resulting from the application of correct maxims generally acknowledged and received." 7 Mass. Rep., 524.

3. The ordinance of the Convention, upon which we are commenting, uses no doubtful or equivocal language. It expressly requires every merchant, etc., to give an account, on oath, of all his purchases in or out of the State during the year 1865. It was passed and ratified, as we have seen, on the 18th day of October in that year. An important question is then presented, whether the Convention had the power to lay a tax upon business done prior to the time when the ordinance was adopted. This question is one of very great importance both to the State and its citizens. In its discussion, it will aid us to consider, for a moment, the extent of the power possessed by the State to levy taxes upon its inhabitants. "The taxing power is one of the highest and most important attributes of sovereignty. It is essential to the establishment and continued existence of the government. Without it, all political institutions would be dissolved, the social fabric would be broken up, and civilization would relapse into barbarism." *State* (85) v. *Petway*, 55 N. C., 405. "The power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government. In imposing a tax, the government acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation. The people of a State, therefore, give to their government a right of taxing themselves and their property, and as the exi-

gencies of the government can not be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the Legislature, and the influence of the constituents over their representatives, to guard them against its abuse." *McCullock* v. *State of Maryland*, 4 Wheat., 428. See also *Providence Bank* v. *Billings*, 2 Peters, 514, at pages 561–563.

Before North Carolina entered into the Federal Union she possessed, as an independent and sovereign State, this unlimited power of taxation, but by adopting the Constitution of the United States, and becoming a member of the Union, she surrendered a portion of this sovereign power, but only such portion as was necessary to enable the general government to carry on and accomplish the purposes for which it was established as a great nation. The taxing power of the State is therefore now restricted, and the extent of this restriction is very well expressed in the case of *Nathan* v. *The State of Louisiana*, How., 73: "The taxing power of a State is one of its attributes of sovereignty, and where there has been no compact with the Federal Government, or cession of jurisdiction for the purposes specified in the Constitution, this power reaches all the property and business within the State which are not properly the means of the general government, and as laid
(86) down by this court it may be exercised at the discretion of the State. The only restraint is the responsibility of the members of the Legislature to their constituents." See also *The People* v. *Mayor of Brooklyn*, decided in the Court of Appeals of New York, 4 Const., 417.

With this large and essential power of taxation unrestrained, except where it may come in conflict with the Constitution of the United States, with a well established right to pass a retrospective law which is not in its nature criminal, we can see nothing to prevent the people from taxing themselves, either through a Convention or a Legislature, in respect to property owned or a business followed anterior to the passage of the ordinance or the statute. The counsel for the State has referred us to several acts of Congress which have such a retrospective effect in taxing income, etc. See 12 Stat. at Large, pages 309, 311, 445 and 472. Whether this retrospection could go back beyond the current year it is unnecessary for us to decide. The ordinance expressly confines the taxation to the year, which is the usual manner of providing for the laying and collecting taxes in this State; for though a revenue law may continue in operation for a longer period than one year, the tax lists are to be made out and the taxes themselves collected annually.

4. We will notice here the objection which was urged in the case of *Murchison* v. *McNeill*, 60 N. C., 217, to a law that imposed a tax upon the profits of a factory commencing at a time anterior to the passage of the act. It was contended by the able counsel who argued that case for the taxpayer, that the law was unconstitutional because the impost was in effect a capitation tax, and as such was not imposed in the manner prescribed by the Constitution of the State, which declares that "capitation tax shall be equal throughout the State upon all individuals subject to the same." See Amendments, Art. 4, sec. 3, chap. 1. "A capitation tax is (as (87) we said in *Gardner* v. *Hall*, *ante*, 21), one upon the person simply, without any reference to his property real or personal, or to any business in which he may be engaged, or to any employment which he may follow. It is rightfully imposed, because of the protection which the government affords to the person independently of the connection or relation of the person to anything else. Every kind of tax must be paid either directly or indirectly by a person; but if he pay it in consequence of his ownership of property, or of a license to follow a profession or trade, or of making profits by the use of money or other thing, or of a privilege granted to him either in writing or orally by the State, or by the permission of the State either expressed or implied, the impost is not a capitation tax; that is, it is not a tax upon his poll and head simply." It is manifest that the tax complained of by the defendant

in this case is a tax upon his business as a merchant, and not a tax upon his head, in the sense in which a capitation tax is used in the Constitution. The requisition upon him to give an account upon oath of the amount of his purchases during the year, is for the purpose solely of ascertaining what amount of tax ought to be imposed upon him as a merchant. This requisition, if our reasoning be correct, the State had a right to make, and he ought not to have refused.

5. The last objection urged on the part of the defendant is, that during a considerable part of the year 1865 the county in which he resided and was doing business was occupied by the Federal forces, in the prosecution of a war against the State of North Carolina; that he was carrying on his trade as a merchant under a license from an agent of the Treasury Department of the United States, and had paid taxes therefor both to the military and civil authorities of that government; that after that arrangement was discontinued, in the month of May, he continued to trade under his license, and had (88) paid the internal revenue tax imposed by an act of the Congress of the United States; that there were no civil officers in his county in the exercise of their functions prior to the organization of the Provisional Government in the State, and that up to that time the town of Beaufort, where he was trading, was in the possession of the Federal forces. Under these circumstances it is contended that he was not liable to pay any tax to the State upon his business prior to the date of the ordinance. In support of this objection the counsel relies upon two grounds. He insists, first, that the occupation of the town of Beaufort was an occupation by a public enemy, and that for the time of its continuance he can not now be made liable to pay taxes for business which he carried on while under the dominion of the enemy; secondly, he contends that he was a licensee of the Federal Government, and as such supplied the army and the country within the Federal lines with provisions, etc., and that to tax his business would be to tax the

means employed in part by the United States for the suppression of the rebellion.

In support of his first position under this objection the counsel relies on the case of the *United States* v. *Rice*, 4 Wheat., 246 (4 Curtis, 391). During the war of 1812 the British captured the port of Castine, in the State of Maine, and held possession of and exercised complete dominion over it until the treaty of peace in 1815, when it was restored to the United States. During its occupation by the enemy goods were imported into it, which, after the war, were held not to be liable to the duties imposed by the United States revenue laws. Such goods, at the time of their importation, were not imported into the United States, and hence, upon the proper construction of its revenue laws, they were held not to be liable to pay duties. The sole question in the case was (as was correctly said by the counsel for the State) one of construction only, and can not be used as an authority for any other purpose. (89) It does not decide, or pretend to decide, that after the territory was restored to the United States in 1815, the State of Maine might not have taxed the property and business of its inhabitants during its occupation by the British, in the same manner as it taxed the other citizens of the State. But admitting, for the sake of argument, that the decision is otherwise, then we say that the case is not at all the same in principle with the one before us. To make it so is to take for granted that North Carolina had a right in 1861 to secede from the United States, and thereby become an indpendent nation; for in such case, it must be admitted that the capture of a portion of her territory in the war which ensued would have been a conquest by a foreign enemy. But such right of secession was repudiated by the first ordinance of the Convention of 1865, and the ordinance of secession in 1861 was declared to have been at all times null and void. The capture of Beaufort by the military force of the United States was not therefore the conquest by a foreign enemy of the territory of the State of North Carolina, but merely the suppression of the rebellion in that part of the State, and when afterwards the State was rehabilitated, its loyal government was restored to all its former powers, including the power of taxation, over all its inhabitants in every part of its territory. This view is fully sustained by the opinion of Judge SPRAGUE in the case of *The Amy Warbeck*, before the United States District Court of Massachusetts, and by that of Judge NELSON, of the Supreme Court of the United States, *in the matter of Jonas Egan*, on a writ of *habeas corpus.*

The second position under the last objection is equally untenable. The defendant was certainly not an officer of the United States. He did not hold any commission under that government, nor receive from it any pay by way of salary or otherwise. He was merely acting under a license from the authorities of the general government to trade on his own account, and for his own profit, with the officers and soldiers of the army, and (90) with the people of the surrounding country. For this privilege he was indeed required to pay a tax to the United States, but that did not prevent his liability to pay another tax to the State. *MacCulloch* v. *State of Maryland*, *ubi supra.* The same principle has, we understand, been decided by the Supreme Court of the United States in what are called The Liquor and Lottery cases. If the defendant can be considered in any proper sense an agent of the general government, still his emoluments as such are liable to State taxation. He can not be regarded in a better light than a clerk in a post-office, and it has been decided by the Supreme Court of Massachusetts that the income of such a clerk, derived from his employment as such, is taxable by the State. *Melcher* v. *Boston*, 9 Met., 73. That case was distinguished from *Dobbins* v. *Commissioners of Erie*, 16 Pet., 435, in which a tax upon the "office" of a Captain in the United States Navy, by a statute of Pennsylvania, was held to be contrary to the Federal Constitution. The Massachusetts court intimate that the decision in *Dobbins' case* might have been different had the tax been imposed upon the "income" instead of the "office." However that may be, it is certain that the present defendant can not claim any immunity from State taxation on the ground of his having been an officer of the United States.

The decision of the court below is believed to be right, and must be affirmed.

PER CURIAM. There is no error.

Memorandum.—The principles involved in the above case were again before the court at this term in *The State v. McNamara*, from Washington, and *The State v. Blagge*, from Craven. In the former case, which was tried before his Honor, *Warren, J.*, at Fall Term, 1866, the defendant offered to account for taxables from the time of the establishment of the Provisional Government in the State; in the latter, tried before his Honor, *Barnes, J.*, at Fall Term, 1866, the defendant declined to account at all. In each case judgment in the court below was against the defendant; and in this court that judgment was affirmed, for the reasons given in the case above.

In all of the cases writs-of-error have been allowed, returnable into the Supreme Court of the United States.

Cited: Tabor v. *Ward*, 83 N. C., 294.

(91)

In the matter of HARRIET AMBROSE and ELIZA AMBROSE.

1. In deciding upon a question of false imprisonment, raised under a writ of *Habeas Corpus*, the Judge may investigate the validity of any order of court relied upon, as here, to prove the petitioners to be apprentices of him who detains them.
2. A County Court has no power to bind as apprentices persons who have no notice of the proceedings for that purpose; and it is prudent in the court to require that such persons shall be present when bound.

(*Stallings v. Gully*, 48 N. C., 344; *Prue v. Hight*, 6 Jon., 265, and *Armstrong v. Harshaw*, 12 N. C., 187, cited and approved; *Owens v. Chaplain*, 48 N. C., 323, distinguished and approved.)

HABEAS CORPUS, coming up by an appeal on the part of the petitioners from an order made by *Gilliam, J.*, at his chambers in Lumberton, during the Fall Circuit of 1866.

The facts are sufficiently stated in the opinion of the court.

Person & French, for the petitioners.

The County Court had no power to bind the petitioners. They do not come within any of the classes which the court is empowered to bind by the Rev. Code, chap. 5, sec. 1. Compare with this the provisions of the Act of 1866, chap. 40. See *Midgett* v. *McBride*, 48 N. C., 22. Courts will not hold such persons to be "free base-born children of color," when such a construction of the statute is invoked in order to affect them injuriously, *ex. gr.*, as here, to deprive them of their liberty. 2d Dwar. Stat., 677, 680–'81. The children of slaves, under our former laws, were not "bastards." See *Howard* v. *Howard*, 51 N. C., 237. Great "inconvenience" would arise from holding that the Ordinance of Emancipation, or the Act of 1866, chap. 40, has the effect of turning these persons into "free base-born children of color." This is to say, that such construction can not prevail; Broom's Max., 85–86; Vaughan's Rep., 37–38; Ram's Science, etc., 57; Co. Lit., 66a, 97b, 152b;
(92) *Doe* v. *Norton*, 11 M. & W., 928; *Turner* v. *Railroad*, 10 M. & W., 434.

The petitioners, or their parents, were entitled to notice of the proposal to bind, by a rule applying universally to proceedings of a judical nature. *Stallings* v. *Gully*, 48 N. C., 344. In *Owens* v. *Chaplain*, 48 N. C., 323, the language of the court to the contrary turns upon the point that, as there said, the party making the question had no interest in it. That is not the case here.

That this appeal will lie under Acts of 1858–'59, chap. 53. See *Musgrove* v. *Kornegay*, 52 N. C., 71.

W. McL. McKay, for the defendant.

READE, J. The petitioners are persons of color, who together with their parents, had been slaves, and were emancipated by the Ordinance of the Convention. They were taken into custody by the defendant Russell, who claimed to hold them as apprentices, under an order of the County Court of Robeson purporting to bind the petitioners to him. The petitioners obtained a writ of *habeas corpus*, returnable before Judge GILLIAM, who upon the hearing remanded them to the custody of the defendant.

Two questions are involved in the case:

1. Had the Judge, upon the hearing, the right to look behind the order of the County Court binding out the petitioners?

His Honor was of the opinion that he was precluded by the order, and had no right to look to the merits of the case.

In this we think there was error. The defendant, who claims the right to restrain the liberty of the petitioners, must show his authority. And when he shows the order of the County Court, the petitioners have the right to reply that the order is void. And this they may do, either by showing that they were not such (93) persons as the court had the power to bind out at all, or that they had no notice of the proceedings against them, and therefore, no opportunity of being heard. If judgment be rendered by a court having no jurisdiction, or against a person who has no notice to defend his rights, it is no judgment at all. *Stallings* v. *Gully*, 48 N. C., 344. And in *Prue* v. *Hight*, 51 N. C., 265, this court did look behind the order of the County Court, to see whether the court had the power to make the order, *i. e.*, had jurisdiction over the petitioner.

2. Does the fact that the petitioners had no notice of the proceedings against them, and were not present when the order of the County Court was made, make the order of binding void?

We think it does. The Constitution and laws of the country guarantee the principle, that no freeman shall be divested of a right by the judgment of a court, unless he shall have been made party to the proceedings in which it shall have been obtained. *Armstrong* v. *Harshaw*, 12 N. C., 187.

In all proceedings of a judicial nature, it is necessary that the person whose rights are to be affected should, in some way, be a party to the proceedings. It is not sufficient that the court should have jurisdiction of the subject-matter, it must also have jurisdiction of the person. It is a clear dictate of justice that no man shall be deprived of his rights of person or property without the privilege of being heard. *Stallings* v. *Gully*, *supra*. And it is well settled that judgment without service of process is void.

The case of *Owens* v. *Chaplain*, 48 N. C., 323, is relied on as showing that neither notice to the person to be bound nor his presence in court is necessary. It is true that in the opinion delivered in that case, it is said that "there is nothing in the statute requiring the presence of the orphan when the binding takes place, though it is usual." But the case did not require that point (94) to be decided. That case was this: An orphan has been bound out by the court, and a third person applied to the court to vacate the order binding out the orphan, and to bind him to that third person. The orphan was not moving in the matter himself, and of course the court refused to interfere at the instance of a third person who had no interest in the matter. So that we can not give to that case the force of a decision upon this question. The case before us is at the instance of a person whose liberty has been affected by the order, and he has the right to raise the question. And we think it clear, that whether the statute requires it or not, the petitioners have a right upon general principle, to be present, or at least to have notice of the proceedings. And although the statute does not in terms require it (which is probably all that was meant by the learned Judge in the case of *Owens* v. *Chaplain*), yet it is fairly to be inferred. The statute, sec. 5, requires the master to give bond to *produce the apprentice before the court* whenever required. And in sec. 7 it is provided, that when a magistrate shall permit a house-keeper to employ an orphan, he shall take his "recognizance *to bring the said orphan to the next County Court,*" to be bound out. So that it seems clearly to be contemplated by the statute itself, that whenever it is necessary for the court to take any action in regard to orphans, the orphan shall be before the court.

The proceedings of our County Courts have been in a summary way, in binding out apprentices. And, although it has been usual to have the person to be bound present, yet we know from observation that it has not been invariably the case, still our courts have usually acted with consideration, and have guarded the rights of the apprentices and given satisfaction to society. And there have been as few complaints of the abuse of power in this as in any other exercise of duty by our courts. It could not well have been otherwise. We have had hitherto but few orphans to bind out. Of course we did not bind out slaves, and there were (95) but few free negroes, and indigent white children usually found friends among their relations to take care of them. And in the few instances where binding was necessary, care was taken by the friends of the children, and by the court itself, that the best that was possible should be done for them. And besides, apprentices were never looked to as profitable, and were seldom taken except by those who felt some interest in their personal welfare, so that there were no inducements to frauds upon the courts.

But now a very different state of things exists. The war has impoverished the country and made wrecks of the estates of orphans; its casualties have greatly increased their numbers; and one-third of the whole population are indigent colored persons. So that the exceptional cases which we formerly had must be greatly multiplied, and the responsibilities and duties of the County Courts must be increased in proportion. It is, therefore, of great importance that their duties and the rights of both apprentices and masters, in the proceedings for binding, should be defined and understood. We have no hesitation in saying that in all cases of binding apprentices, whether white or colored, it is the right of the persons to be bound to have notice, and it is the duty of the court to see that they have notice; and it is, to say the least, prudent in the court to require that the persons should be present in court. There can be no case where notice can be dispensed with, and the actual presence of the person ought only to be dispensed with where he has intelligent friends present who can see that his interests are properly guarded.

The case before us shows the propriety of what we have just said. Take the case as stated by Judge GILLIAM: The petitioners are females, respectively thirteen and fifteen years of age, ages when they stand most in need of the oversight of their parents and friends. They are industrious, well behaved and amply provided for in food and clothing. They live with their mother (96) and step-father, who are of good character and are well to do. What interest had society in having these relations broken up, and themselves put under the care of strangers, with no affection for them, nor any other interest, except gain from their service. Now if these persons or their friends had been present when the application was made for their binding, would any court in the State have bound them out? Of course not. It would have been a gross outrage if they had. A court ought not to, and will not, bind out an orphan unless it appear that its condition will be improved. It is a high duty of the court, and one which they perform with pleasure, to protect these helpless children, and not only to prevent oppression and fraud, but to act as friends and guardians, and improve their condition. I remember that when I was at the bar, the County Court of Granville had ordered sundry orphans to be brought to court to be bound out. Among them were three or four who were neat and clean, and their mother was with them. She cried much, but said not a word. Upon inquiring it was found that she was an honest, industrious woman and widow, who had labored hard for her children, and that just when they could begin to help her the rapacity of some bad man sought to take them

away. Some gentleman of the bar suggested that, instead of taking away her children, there should be a contribution to enable her to keep them, and it was readily responded to by the court and the bar and the crowd, and a handsome sum was given to her, and she kept her children. There is shown the propriety of having the persons actually present in court, in order that the court may see their condition, the condition of their parents or friends who have charge of them, and to hear their own simple story; and if binding be necessary, to see their capacity and fitness for one employment and another, and also to give publicity to the matter,
(97) so as to invite applicants, in order that the court may select the best masters.

In the case before us it is manifest, from the statement of the case sent us, that the humane and intelligent Judge, who heard the cause, would never have remanded the petitioners to the custody of the defendant, if he had supposed that he had the right to look behind the order of binding, not so much perhaps for any fault in the defendant as because there was no propriety in taking them from the society and services of their parents and friends to bind them to any person.

There was an interesting discussion at the bar as to the class with which the petitioners were to be put, supposing that they were liable to be bound out at all. Our statute, Rev. Code, chap. 5, sec. 1, passed before the war, provides that "It shall be the duty of the several Courts of Pleas and Quarter Sessions to bind out as apprentices all orphans whose estates are of so small value that no person will educate and maintain them for the profits thereof." And after enumerating other classes, the statute proceeds: "Also the children of free negroes, where the parents with whom such children may live do not habitually employ their time in some honest, industrious occupation, and all free base-born children of color."

But it was not necessary, and therefore it would be improper for us to enter into the consideration of those questions, because whether they belong to one class or another, they were entitled to notice before they could be bound out, and as they had no notice and were not present, the binding was void, and therefore they are entitled to their discharge, and to go wheresoever they will.

PER CURIAM. Decree accordingly.

(98)

JESSE S. WALTON v. DREWRY A. SUGG and others.

1. Citizens of North Carolina, who authorize a suit to be brought in Texas, are personally liable for the costs adjudged against them upon their failure in such suit, although they may never have been in that State; and a judgment therefor may be enforced in North Carolina as a valid foreign judgment.
2. In an action upon a judgment given in another State, after it is seen that the person against whom such judgment was given was regularly made a party to that suit, no question can be made whether that court ought to have rendered such a judgment; but full faith and credit must be given to it.
3. Costs awarded upon retaxation are virtually included in the original judgment in a cause.
4. Notice of retaxation, if necessary at all, may be served upon an attorney in the suit to which the costs are claimed to be incident.
5. After an attorney has been admitted by the court to represent a party, he can not, unless with the consent of the court, be discharged before the end of the suit.
6. A suit does not end before complete satisfaction of, or discharge from, the judgment given therein.

DEBT *on a foreign judgment*, tried before his Honor, *Osborne, J.*, at Spring Term, 1861, of the Superior Court of Greene.

The defendants had brought suit in 1857, in the District Court of Navarro County, Texas; and in the course of such suit a number of slaves had been attached by Walton as sheriff, and had been held in his possession for several months. At May Term, 1858, judgment was given against the plaintiffs in that cause for "costs," which thereupon were taxed. At September Term Walton filed a motion in writing, asking for a retaxation, in order that his costs for holding the slaves might be allowed. The present defendants had never been in Texas, and had carried on their suit there by attorneys. Notice of Walton's motion was served upon those attorneys. They objected to such notice, on the ground that they were no longer the plaintiff's attorneys, the suit which they had been authorized to bring having (99) come to an end in the preceding May. The court in Texas overruled this objection and, after an investigation, gave judgment for the amount now sued for.

It was also shown that upon the termination of the suit, at May Term, an agent of the present defendants, then in court, had instructed the attorneys to attend to the matter of costs, so as to reduce them as much as possible.

To the present action the defendants pleaded *Nul tiel record*, *Payment*, *General Issue*, *Statute of Limitations;* and specially, *That defendants had no legal notice of process*, and *That process was not legally served upon them.*

Verdict for the plaintiff. Rule for a new trial. Rule discharged. Judgment, and appeal.

No counsel for the appellants.
Phillips & Battle, for the plaintiff.

1. The record now sued upon is the highest evidence of the law of Texas upon the points involved therein. *Irby* v. *Wilson*, 21 N. C., 568; *Davidson* v. *Sharpe*, 28 N. C., 11; *Sheehy* v. *Life Company*, 91 Eng. C. L., 597.

2. The only question left to this court is whether that law is or is not *repugnant to natural justice.*

By bringing a suit in the courts of Texas these defendants submitted themselves personally to the laws of that State in everything incidental to such suit. The judgments there upon the subject of costs, as here in equity, are for "costs" generally. These judgments cover all costs properly taxed thereafter by the clerk, as much as if they had been at first spread out in detail.

For a valid taxation of costs it is not necessary, at law or in equity, that the party against whom they are taxed should be present, or should have been notified. Tidd, 2d, 999; Arch. Pr., 1, 224; Dan. Ch. Pr., 3d, 1586. Generally, neither the court nor the party knows anything of this. Nor is there any reason why, if a (100) slip has occurred in giving the details properly upon taxation, a retaxation might not be had without notice. If the former execution has been returned "satisfied," a motion to the court for an amendment may be necessary before issuing a second (*Poor* v. *Deaver*, 23 N. C., 391); but this, as said by *Martin* in the case above in 91 Eng. C. L., is a question not of natural law, but merely of *procedure;* and if Texas do not require it, we can not review her discretion therein. If costs have not been properly taxed, the party grieved may bring the matter to the attention of the court for redress; but to do so with success he would have to show substantial injury, and not merely want of notification of the time and place of taxation.

The attorneys in Texas were not discharged after the judgment in May. The rule, both at law and in equity, is, that one who is admitted to represent a party as attorney, can not cease such representation *without the permission of the court.* Dan. Ch. Pr., 1, 512, which gives a rule on the subject that existed at law at least as far back as 1654. See C. J. Taney's strong language in *United States* v. *Curry*, 6 How., 106. The principle of the cases in Rol. Rep., 1, 365; 6, 8 and 10 Johns., and 2 Inst., 378, showing that judgment terminates the connection of attorney and client, is not, in general, the rule even at law. See Arch. Pr., 1, 28, etc. Those cases do not at all affect the practice in equity, which is more like the anomalous proceedings in Texas. See also *Bank of Australia* v. *Nias*, 4 Eng. L. & E., 252; *Zulueta* v. *Vysent*, 3 Eng. L. & E., 76; *Hope* v. *Hope*, 27 Eng. L. & E., 249; 1 Dan. Ch. Pr , 502, etc.; *Johnson* v. *Person*, 16 N. C., 364.

Costs retaxed are recovered under the original judgment in the cause. *Gov.* v. *Twitty*, 12 N. C., 150; *Sneed* v. *Rhodes*, 19 N. C., 386, and *Poor* v. *Deaver* (above). See *Peyton* v. *Brooks*, 3 Cr., 92. The foreign judgment here sued upon is that of May, 1858, the obligation of which, upon the persons of these defendants, can not be denied.

(101) How irregularly, proceedings for obtaining costs are entitled, may be seen from many cases in our reports. See *Clerk's Office* v. *Allen*, 52 N. C., 156, and cases there cited; also *Pearson* v. *Haden*, 5 N. C., 140.

READE, J. It is a fundamental principle that a party must have notice of any proceeding against him before he can be bound thereby. The defendants say they had no notice of the proceedings against them, and that therefore they are not bound.

The facts are, that the defendants instituted a suit in Texas, and failed therein, and judgment was given against them for the costs. The plaintiff was sheriff in Texas, and the present claim is for his fees as sheriff in the Texas suit, and was a part of the costs in the cause. The sheriff's fees were not taxed by the clerk in the bill of costs, as at first made out, and were retaxed, upon motion. Notice of the motion was served upon the attorneys of the plaintiff in that suit who are the defendants in this.

1. Were the defendants entitled to special notice? They were the plaintiffs in the cause, and, therefore, were constructively in court all the while, to see all the proceedings from the beginning to the end. And the end is not the close of the trial, but the complete satisfaction of, or discharge from, the judgment of the court. The sheriff's claim was not a distinct demand, separate from that suit, but was incident to it, and is expressly stated in the case to be a part of the costs. And the proceeding to retax was not a separate suit, but was a

motion in that cause. It would seem, therefore, that as the defendants in this, the plaintiffs in that suit, sought the aid of the Texas court and its officers, they were bound to know what was the judgment of the court without special notice. The judgment was that they should pay the costs; the sheriff's fees were a part of the costs, and therefore the judgment was that they should pay the sheriff's fees. And that being the judg- (102) ment of the court, the failure of the clerk to make a proper memorial of it, and to tax the costs, did not alter the judgment. And upon its being brought to the notice of the court, that its judgment was not properly entered by the clerk, it was the duty of the court to have the record corrected, so as to make it speak the truth. It would seem, therefore, that no other court can look into the proceedings to see whether the court ought to have rendered such a judgment; but that every other court must give faith and credit to the same, if the person, against whom the judgment is, was regularly a party to the suit; and in regard to that no question can arise in this case, because the defendants in this were the plaintiffs in that suit.

But suppose this were not so, then:

2. Did the defendants have notice of the motion to retax the costs?

The defendants live in North Carolina, and the notice was served upon their attorneys in the Texas suit. The attorneys say that they were instructed by the defendants to see that the costs were reduced as much as possible, but they were not specially instructed in regard to the notice to retax. And the defendants insist that they ceased to be their attorneys when the trial ended, although they had not been expressly discharged. "The warrant of attorney continues until the end of the suit, and he may sue out and prosecute execution after judgment, and may receive the amount of the judgment and costs. Pending the suit, the client can not change his attorney without leave of the court." 1 Arch. Pr., 27. In the case of *The United States* v. *Curry*, 6 How., 106., in which a question was made as to the validity of a citation in a writ of error, served upon the attorney in the original cause, C. J. TANEY, in delivering the opinion, says: "No attorney or solicitor can withdraw his name after he has once entered it on the record, without the leave of the court. And while his name continues there, the adverse (103) party has the right to treat him as the authorized attorney or solicitor, and the service of notice on him is as valid as if served on the party himself. And we presume that no court would permit an attorney, who had appeared at the trial with the sanction of the party, expressed or implied, to withdraw his name after the case was finally decided. For, if that could be done, it would be impossible to serve the citation, where the party lived in a distant country or his place of residence was unknown, and would, in every case, occasion unnecessary expense and difficulty, unless he lived at the place where the court was held. And so far from permitting an attorney to embarrass and impede the administration of justice, by withdrawing his name after trial and final decree, we think the court should regard any attempt to do so as open to just rebuke."

In that case the affidavit of the attorney was filed, and in that it was stated that at the time of service of notice on him he was not the attorney, but had been paid his fee and discharged, and that he so informed the marshal when he served the notice. Yet the notice was held to be sufficient. "If the opposite party wish to be present at the taxation of cost, and doubt if the other party will give him notice of it, he may obtain from the clerk of the rules a rule to be present at the taxation. In fair practice, however, it is usual to give notice of taxation without being ruled to do so." 1 Arch. Pr., 225.

It is usually entrusted to the clerk to make out the costs, and a motion to retax is in the nature of an appeal from his decision to the court; and although the opposite party may have no such right to notice, as that it can be collaterally inquired into in another court, yet it is supposed that the court in which the motion is made will see that notice is given. In the Texas court notice was served upon the attorneys in the cause, and we can not see that there was any error. There is no error.

PER CURIAM. Judgment affirmed.

Cited: *Day* v. *Abrams*, 63 N. C., 256; *Newbern* v. *Jones*, *Id.*, 607; *Branch* v. *Walker*, 92 N. C., 91; *Gooch* v. *Peebles*, 105 N. C., 427.

(104)

JOHN W. SCOTT v. WILLIAM P. ELLIOTT.

1. Possession of a chattel by one who holds for himself, in respect to either a general or a special property, will support *Replevin* or *Trover;* such possession for another, will not support an action; therefore,
2. Where the plaintiff took possession of a steamboat, which had been sold to him by a sheriff with the understanding that if the sale was not valid he should be bailee for the sheriff: *Held,* that he had title sufficient to maintain Replevin.

REPLEVIN, to recover possession of a steamboat, tried before *Buxton*, *J.*, upon the pleas, *General issue Property in the defendant*, at December Special Term, 1866, of the Superior Court of Chatham.

The facts were that the Sheriff of Chatham County had levied an attachment upon the steamer at Haywood, under the act giving a lien for work, etc., done upon vessels; that it was afterwards condemned, as "perishable," by three free-holders, and being sold was purchased by the plaintiff, subject to an understanding that if such sale was not valid the boat should be returned to the sheriff; that afterwards the plaintiff placed the boat in charge of a Captain Williams, who ran it to Fayetteville, where it was seized by the defendant, who afterwards refused to give it up.

The Supreme Court having held that the sale by the sheriff was invalid (*Broan* v. *The Enterprize*, 53 N. C., 260), his Honor was of opinion that nothing passed by such sale except a bare possession, not coupled with any interest, and that after such possession had been transferred to Williams, nothing remained in the plaintiff. Upon this intimation the plaintiff submitted to a nonsuit, and appealed to this court.

Howze, for the plaintiff.

1. *Hampton* v. *Brown*, 35 N. C., 18, shows that a sheriff may have a bailee, although the deputy in that case was held not to be such. If he could have (105) one in any case, then in this, in which the sheriff could not be expected to retain the thing in his personal possession, and where in fact Scott was responsible over to him.

2. Trover (therefore Replevin) lies for a gratuitous bailee who is responsible over to his bailor. 1 Ch. Pl., 173. The "title" necessary under the second plea is only such as will sustain trover, and this against a wrongdoer is bare possession. *Branch* v. *Morrison*, 50 N. C., 16. Elliott is no better than a wrongdoer, for whom a plausible plea without proof avails nothing. 1 Ch. Pl., 171; 2 Saund. Rep., 47, n. d.

3. Williams was only a servant of Scott.

Phillips & Battle, for the defendant.

In trover the declaration states that the plaintiff was "lawfully possessed, as of his own property," of the things in question. The expression, "as of his own property," is material. The evidence to support it may be various. As against wrongdoers, possession is sufficient. If there were no possession, some other evidence of property is required. In case of ownership it is said that the property draws to it the possession. This is said to satisfy the former clause quoted above, "lawfully possessed." Here the trouble is about the latter clause; the plaintiff was not in actual possession, and was himself but the bare depositary of the sheriff. Constructive possession is never evidence of title, but on the contrary it is title which gives rise to the notion of constructive possession. This case is like that where trover was brought for a hawk not stated in the declaration to have been reclaimed, and at same time stated to have been out of the actual possession of the plaintiff; there was no evidence of title. *Fries* v. *Spencer*, Dyer, 306, b; so *Sutton* v. *Moody*, 1 Ld. Ray, 250.

2. Scott was only servant of the sheriff. *Hampton* v. *Rhodes*, 35 N. C., 18, 1 Ch. Pl., 151; *Gordon* v. *Harper*, 7 T. R., 12; *Baker* v. *Miller*, 6 John., 195; (106) *Popelston* v. *Skinner*, 20 N. C., 156; *Douglas* v. *Mitchell*, 7 N. C., 239; *Dillenback* v. *Jerome*, 7 Cow., 294; *Ludden* v. *Leavitt*, 9 Mass., 104; *Eastman* v. *Avery*, 23 Me., 248.

3. Public policy may be interested against permitting arrangements like this, where property is taken out of the bailiwick, and occasion given thereby to strife. *Miles* v. *Cattle*, 6 Bing., 743.

PEARSON, C. J. One who has possession of a chattel for himself, in respect to either a special or general property, may maintain replevin or trover. One who has possession of a chattel for another, and not for himself, can not maintain an action.

The rule is settled, and the only difficulty is in making its application. Our case falls under the first branch of the rule, as will be made apparent by citing a few instances under each.

A common carrier has possession for himself in respect to his special property, and may maintain an action. So one who hires or borrows a horse is in possession for himself in respect to his special property. Such is the case in every bailment, and an action lies in the name of the bailee, and an indictment for larceny may lay it as his property.

On the other hand, an overseer holds possession for his employer and not for himself, and can not maintain an action. So one who is driving the wagon of another is not in possession for himself, but as the servant of the other. His possession is that of the man who hired him to take charge of the wagon. Such was the status of Williams in our case. He was the mere servant of Scott, and his possession was Scott's possession.

So, if the sheriff making a levy puts the property in charge of a third person, who is to deliver it on the day of sale, that person is considered as a mere servant holding possession for the sheriff, and having no general or special property in himself. (107) Such is the case in 9 Massachusetts, 104, and the other cases cited on the argument.

In our case the sheriff sold the steamer to Scott, and put her in his possession, with the understanding that if the sale was not valid, he would return her to the sheriff. Obviously Scott did not take possession for the sheriff, but for himself in respect to the general ownership which he supposed he had acquired. The character of his possession was not at all affected by the understanding as to the return of the steamer. The suit in which the validity of the sale is put in controversy was not decided until December Term, 1860. So, from the time of the sale, 1857, up to 1860, Scott was holding possession "for himself." During this time the sheriff had no right to take the boat from him. This is the test to show that he was not the servant of the sheriff. Suppose one hires my horse for a year, but agrees to return him before the end of the year on the happening of a contingency. Will anyone say that he is my servant, and is holding possession for me and not for himself?

There is error.

PER CURIAM. *Venire de novo.*

(108)

THE STATE v. A. MYERFIELD.

1. Where an offer to strike is made with a deadly weapon the law does not allow it to be explained by words used at the time; therefore,
2. Where the defendant, whilst standing in the door of his grocery, held a pistol in his hand, sometimes bearing upon A and sometimes not, and swearing that if A came in he would shoot him: *Held*, that he was guilty of an assault.
3. Discussion of the distinction between "attempts to strike" and "offers to strike," and between the effect of words used where an "offer to strike" is made with a deadly weapon, or without one.

(*The State v. Davis*, 23 N. C., 125; *S. v. Crow*, *Id.*, 375; *S. v. Morgan* 25 N. C., 186; *S. v. McDonald*, 49 N. C., 19; *S. v. Brandon,* 53 N C., 463, cited and approved.)

ASSAULT, tried before *Buxton*, *J.*, at Fall Term, 1866, of the Superior Court of Rowan.

The assault was charged to have been committed upon one Shaver, as the latter was walking to and fro in the street in front of the door of defendant's grocery. The evidence showed that at this time the defendant stood in his door with a pistol in his hand presented, sometimes bearing upon Shaver and sometimes not, and swearing that if Shaver came in he would shoot him. Shaver threatened that if defendant came out he would whip him.

The court below charged the jury that presenting a pistol at another is an assault in law, and that if Shaver were making no attempt to enter the house of the defendant, the latter was guilty.

The counsel for the defendant asked the court below to charge the jury, that if they believd that the defendant had no present purpose of shooting Shaver, but only intended to shoot him in case he attempted to enter the house, and that he intimated this purpose by language used upon the occasion, then that the presenting the pistol was not an assault. The court refused to give such a charge.

(109) Verdict, *Guilty*. Rule for a new trial. Rule discharged. Judgment, and appeal.

Attorney-General, for the State.
Boyden & Bailey, for the defendant.

1. The Judge erred in drawing a conclusion of law from what was but evidence to the jury. See 3 Green. Ev., secs. 59–61. The jury must find an intention to strike. *State* v. *Davis*, 23 N. C., 127.
2. Defendant was entitled to the instructions for which he asked. *State* v. *Davis*, 23 N. C., 125; *State* v. *Crow*, *Id.*, 375; *Blake* v. *Brevard*, 9 C. & P., 626.
3. The Judge erred in causing the case to turn upon a question of justification, instead of one of intent.
4. No evidence that pistol was loaded, and therefore no assault. *Blake* v. *Brevard*, above.
5. Defendant justified in preventing Shaver from entering, provided the force, as shown by testimony, was not disproportioned.

PEARSON, C. J. It was supposed that "*Davis' case*," 23 N. C., 125, "*Crow's case*," *Ib.*, 375, and "*Morgan's case*," 25 N.C., 186, had settled the doctrine of "assault," and no further explication would be required. We are gratified to find that the opinion of the learned Judge, who decided this case in the court below, and of the learned Judge, who decided the case of *Isenhour*,* which turns on the same point, does not disturb the doctrine established by these cases, so that the question in hand is simply one of application.

An assault is "an offer or attempt to strike the person of another." If one aims a blow at another, and it does not take effect, because the party gets out of the way, or it is warded off by a third person, or if one shoots at another and misses, it is an "attempt to strike." Such acts are unequivocal, and in most cases are easily disposed of.

(110) But "an offer to strike" presents more difficulty. It is often an equivocal act, which may admit of explanation, as is said in "*Davis' case*." It is difficult in practice to draw the precise lines which sep-

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*Decided at this term, and not reported.

arate violence menaced from violence begun to be executed. "An offer to strike" is an act which is the beginning of the act of striking, and most usually results in a blow, as if one draws back his fist or raises a stick, it is violence begun to be executed and amounts to an assault, being "an offer to strike."

This is the general rule. There are two exceptions:

1. When the offer is explained by a declaration showing that it is not the intention of the party to strike, the law makes an allowance for the angry passions of man, and the act is treated as a mere "gesture of passion." The familiar case of one who in a quarrel laid his hand on his sword and said, "if it were not *assize* time I would not take such language from you," and "*Crow's case*," where the defendant raised a whip and said, "if you were not an old man, I would knock you down," are instances under this exception.

2. When the offer is made with a condition precedent, showing that it is not the intention to strike, provided the condition is performed. In these cases a distinction is taken: If the condition be one which the party has a right to impose, the offer to strike unless the condition is complied with, is not an assault; as, if one being forbidden is about to enter my house, and I raise a stick and say, "if you attempt to enter I will knock you down," there is no assault. But if the condition be one which the party has no right to impose, the offer to strike is an assault, notwithstanding the condition, for no man can take advantage of his own wrong; as, if one raises a stick and says, "pull off your hat"—or "deliver up your money, or I will knock you down."

These distinctions are settled. The counsel for the defendant seems to have overlooked the fact that there is an exception to these exceptions, to-wit: When (111) the "offer to strike" is made with a deadly weapon, the law does not allow it to be explained, and will not permit the party to say, "it was a gesture of anger," or an offer to kill with a condition precedent which he had a right to impose.

It should be noted that in the "assize case," as it is familiarly called, the party laid his hand on his sword, but did not draw it. With that class of cases, however, we are not concerned. Our case is that of one who qualifies his offer to strike by a condition which he had a right to impose. *Does the character of the weapon used* make the case an exception to the exception? We concur with the opinion of his Honor.

If one deliberately, and at the outset, kills another with a deadly weapon, in order to prevent a mere trespass on his property, it is murder. *State* v. *McDonald*, 49 N. C., 19; *State* v. *Brandon*, 53 N. C., 463. So if one offers to strike with a deadly weapon, although he announces his purpose not to finish the act and commit murder, if his terms are instantly complied with (although the terms be such as he has a right to exact by the "*molliter manus imposuit*"), he is guilty of an assault; for the putting in use a deadly weapon at the outset, and before resorting to a milder mode of prevention, shows ruthlessness and a wanton disregard of human life and social duty. *State* v. *Morgan, ubi supra.* In *Morgan's case*, *McDonald's case*, and *Brandon's case*, the resort to the deadly weapon was at the outset, and the language of the court must be understood in reference to that state of facts. For, as is said by Foster in regard to arrests, 271, "The person having authority to arrest may repel force by force, and if death ensue in the struggle he will be justified. This is founded in reason and public utility, for few men would quietly submit to an arrest if in every case of resistance the party empowered to arrest was obliged to desist and leave the business undone." So in regard to the right to prevent a trespass.

(112) Our conclusion from all the cases is, that an offer to strike with the fist or a stick or a whip is not an assault, provided there be no present intention to strike, which may be inferred from the declaration of the party and the accompanying circumstances; or provided the intention to strike is made to depend upon a condition precedent which the party has a rght to

impose; but that an offer to strike with a deadly weapon can not be thus explained. There is in the nature of things a marked difference between the act of raising a stick or whip and talking about striking, "with ifs and ands," and the act of drawing a bowie-knife, or of cocking a pistol and bringing it to bear on the person. The former may be passed over as "gestures of anger," but the latter can not be explained away in that manner, and the law could not tolerate such acts and be true to itself.

There is no error. This will be certified.

PER CURIAM. Judgment affirmed.

Cited: State v. *Hampton*, 63 N. C., 14; *State* v. *Church*, *Id.*, 16; *State* v. *Hinson*, 82 N.C., 598; *State* v. *Horne*, 92 N. C., 807; *State* v. *Sigman*, 92 N. C., 732.

Dist.: State v. *Milsaps*, 82 N. C., 550.

HENDERSON SIMPSON v. SAMUEL SUTTON.

1. The "year and a day" mentioned in the Rev. Code, c. 31, s. 109, runs from the issuing, and not from the return of the execution; therefore,
2. Where the former execution had been issued February 14, 1855, a second, purporting to be an *alias*, issued May 3, 1866, was set aside as irregular.

(*Boyden v. Odeneal*, 12 N. C., 171, cited and approved.)

MOTION to set aside an execution, made before his Honor, *Warren, J.*, at Fall Term, 1866, of the Superior Court of Hertford.

The facts were as follows: The plaintiff, at Fall Term, 1864, had obtained a judgment by default against the defendant. A *fi. fa.*, tested of that term, had (113) issued February 14, 1865, being returnable to Spring Term, 1865. A second execution, purporting to be an *alias*, was issued May 3, 1866, tested of Spring Term, 1866, and returnable to Fall Term, 1866. On the 15th of May, 1866, the defendant executed a deed conveying all of his property (some of which had been levied upon under the execution) in trust to pay debts, excluding the judgment above.

Upon this state of facts a motion was made by the defendant and the trustee to set aside the second execution, as having issued under a dormant judgment. A counter motion was at the same time submitted by the plaintiff to amend the former execution by making it returnable to Fall Term, 1865.

His Honor refused the latter motion, and ordered the second execution to be set aside.

Smith, for the plaintiff.
Yeates, for the defendant.

READE, J. Two questions are presented in this case:

1. The power of the court to allow the amendment asked by the plaintiff.

2. The effect of the amendment if made.

It is unnecessary to decide the first question, because the decision of the second disposes of the case.

The amendment, if made, would not avail the plaintiff. The time of issuing process is the time when it leaves the office. *Boyden* v. *Odeneal*, 12 N. C., 171. The time of issuing the first *fi. fa.* was February 14, 1865. The second *fi. fa.* issued May 3, 1866, more than a year and a day from the issuing of the first. And therefore the judgment was dormant.

It was insisted in the argument that if the first *fi. fa.* were amended so as to make it returnable to Fall instead of Spring Term, 1865, the issuing of the (114) second would be within a year and a day from the return of the first, and that "the year and a day" was to be counted from the return of the one to the issuing of the other. But that is not correct, for the statute (Rev. Code, chap. 31, sec. 109), admits of no doubt that "the year and a day" is to be counted, not from the return of one to the issuing of the other, but from the issuing of one to the issuing of the other.

There is no error.

PER CURIAM. Judgment affirmed.

Cited: Jacobs v. *Burgwyn*, 63 N. C., 195; *Foard* v. *Alexander*, 64 N. C., 70.

W. C. DAVIS v. L. C. DASHIEL.

The 12th section of the Revenue Act of 1866, which imposes a tax of fifteen per cent upon spirituous liquors purchased by residents of persons not residing in the State, and only ten per cent upon such as are purchased from the maker in the State, is constitutional.

TRESPASS VI ET ARMIS, brought to Fall Term, 1866, of the Superior Court of Pasuotank. Plea, *Not Guilty.*

The case agreed showed that the plaintiff, a resident of the State, purchased in Virginia, of a resident there, two hundred gallons of whisky, and brought it into the county of Pasquotank, and there sold it. The sheriff of that county, the present defendant, having called upon the plaintiff for the tax, was tendered by him fifty dollars, being 10 per cent upon the purchase. This the defendant refused to receive, and afterwards by force compelled the plaintiff to pay seventy-five dollars, being 15 per cent upon the purchase. It was agreed that if the court should be of opinion with the plaintiff, he should have judgment for twenty-five dollars, and that otherwise there should be judgment of nonsuit.

(115) His Honor, *Warren, J.*, being of opinion with the defendant, gave judgment of nonsuit, and the plaintiff appealed.

Bragg, for the plaintiff.

Attorney-General, for the defendant.

BATTLE, J. The twelfth section of the Revenue Law for 1866 imposes a tax upon "Every resident of the State who brings into the State, or buys from a nonresident, whether by sample or otherwise, spirituous liquors, etc., for the purpose of sale, 15 per cent on the amount of his purchases," and on "every person who buys to sell again spirituous liquors, etc., from the maker in this State, his agent, factor, or commission merchant, 10 per cent on the amount of his purchases." The question presented on the record in this case is whether a tax law, which thus discriminates between articles imported and articles manufactured in the State, is constitutional and valid, at least as to the excess of the tax imposed upon the imported over that upon the native article. This is a question of some importance to the taxpayer, but of much greater importance to the State, which for the last fifty years has been deriving no inconsiderable revenue from such discriminating imposts. See, among other acts, those of 1822 (Taylor's Revisal, chap. 1129), of 1836 (Rev. Stat., chap. 102, sec. 10), and of 1854 (Rev. Code, chap. 99, sec. 30).

The objection to the validity of the act in question is founded upon its alleged repugnance to the provisions of the Constitution of the United States, which declare that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports except what shall be absolutely necessary for executing its inspection laws," and that "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." Const. of U. S., Art. 1, sec. 10, par. 2; and sec. 8, par. 3.

(116) The clause which prohibits the State from imposing a tax or duty on imports has been held to extend not only to the act of importation, but to the article imported, while it is kept for sale in bulk or package, but the restriction is removed the moment the article is withdrawn from the market as a subject of commerce and diverted to the importer's private use, or is offered for sale in a peculiar manner, as by auction, or by hawking or peddling, or in any manner by retail.

See *McCulloch* v. *State of Maryland*, 4 Wheat., 316; *Brown* v. *State of Maryland*, 12 Wheat., 419; *Wynne* v. *Wright*, 18 N. C., 19. The reason given why the imported article ceases to be exempted from State taxation as soon as it ceases to be kept in bulk by the importer as a subject of commerce, is that it then becomes incorporated with the mass of the property in the State; and as it enjoys the protection of the laws of the State it must bear its proportion of the burden necessary for the State government. The authorities to which we have referred show further, that even when the article has been sold in bulk by the importer, it will become liable in the hands of the vendee or assignee to the taxing power of the State.

The power of the State to tax goods which have been imported and afterwards mixed up with the other property in the State having been shown to exist, notwithstanding the clauses of the Constitution of the United States to which we have referred, the only inquiry which remains is, whether a discrimination can be made between such goods and those of a like kind, which are of the growth or manufacture of the State.

Upon this question the court, in deciding the case of *Wynne* v. *Wright*, above referred to, thus expresses itself: "It would seem to follow that a tax may constitutionally be imposed on such goods thus appropriated to private use, or offered for sale in a peculiar manner, although they be taxed by the name of goods im-
(117) ported, or goods not of the production of the
State. For a State may certainly exercise her own discretion in selecting the objects of taxation amongst those which are liable to taxation, and the name given in the statute is only the mode of designation or description.

"Whenever the power of the State to tax arises, it is because the thing taxed is not 'an article imported,' as understood in the Constitution; and if the State tax it by that name, that can not bring it again, and by force thereof, within the Constitution, and make it to be such 'an article imported' as is not subject to taxation."

The court, notwithstanding this strong expression of opinion, declined to make it an adjudication, because it was unnecessary to the decision of the case then before them.

But the reasoning seems to be unanswerable, and we do not see how the conclusion can be resisted. It is but the operation of the principle stated by the Supreme Court of the United States in the case of *Nathan* v. *The State of Louisiana*, 7 How., 73, that "the taxing power of a State is one of its attributes of sovereignty. And where there has been no compact with the Federal Government, or cession of jurisdiction for the purposes specified in the Constitution, this power reaches all the property and business within the State which are not properly the means of the general government, and as laid down by this court, it may be exercised at the discretion of the State. The only restraint is found in the responsibility of the members of the Legislature to their constituents."

The power to discriminate in laying taxes upon goods imported, after they have become incorporated with the general mass of property in the State, being thus vindicated, it is manifest that there is no difference in principle between the taxing of goods of the like kind grown or manufactured in the State, and the imposition of a heavier tax on the former than upon the latter. It follows that the plaintiff, in the case now before us, (118) was rightfully compelled to pay the higher tax which the law imposed upon the amount of his purchase out of the State. He did not pretend that the article which he had imported had been sold in bulk, but admitted that it was liable to taxation, by voluntarily paying the same imposts upon his purchase as if it had been made in the State. The judgment of nonsuit given against him in the Superior Court must therefore be affirmed.

PER CURIAM. Judgment affirmed.

Cited: *Huggins* v. *Hinson*, *post*, 129.

Overruled: *Albertson* v. *Wallace*, 81 N. C., 485.

SAMUEL T. CARROW and others v. The President and Directors of the WASHINGTON TOLL-BRIDGE COMPANY, and others.

1. An act incorporating a ferry or toll-bridge, is a private act; therefore,
2. The court can not take judicial notice of the act of December, 1866, which amends the charter of the Washington Toll-bridge Company.

(*Smith v. Harkins*, 38 N. C., 613; *State v. Rives*, 27 N. C., 297; *Saunders v. Hathaway*, 25 N. C., 402; *Taylor v. Railroad Co.*, 49 N. C., 277, cited and approved.)

PETITION to establish a public ferry across Pamlico River at the town of Washington, heard upon appeal from the order of the County Court granting the same, by his Honor, *Barnes, J.*, at Fall Term, 1866, of the Superior Court of Beaufort. From his Honor's order, affirming that in the County Court, the defendants appealed to this court.

The facts appear set forth sufficiently in the opinion of the court

Haywood, for the petitioners.
Phillips & Battle, for the defendants.

1. In petitions for franchises not even an inchoate right passes until the proceedings are terminated (119) by a grant. A rejection of the prayer therefore, whether by the department which ordinarily administers this sovereign function, or by an interference upon the part of the State as more solemnly represented in the General Assembly, can disappoint no just claim of the petitioners. 1 Black., 243, 272; *Uwchlan Township Case*, 30 Pa., 156. This case is not so striking as those of *The United States* v. *Morris*, 10 Wheat., 246; *Clarke* v. *McReary*, 13 Sm. & M., 347, and *Price* v. *Sessionz*, 3 How., 624, where *inchoate rights* were defeated by legislation.

2. The act in question, being an amendment of a public law, is itself a public law. That the original act

chartering the bridge is *public* is shown by its containing *a penalty* enforceable against *everybody.* Besides, in general, all acts which incorporate companies for railroads, ferries, bridges, etc., are *public.* They are termed of late *public local laws.* Certain expressions in former cases alluding to these as *private* acts, were either not necessary to the decisions there made, or were not made deliberately upon full discussion of the modern classification. The class to which they belong is now well understood, both in England and America. The court will therefore *take notice* of this amendment, which forbids the grant of the petition now before it. Dwarris Stat.

BATTLE, J. The power of the Court of Pleas and Quarter Sessions of Beaufort County to order the establishment of a ferry at the place indicated in the pleadings, notwithstanding its propinquity to the toll-bridge of the defendants, is clearly settled by its authority, and can not now be disputed. *Smith* v. *Harkins*, 38 N. C., 613; *Charles River Bridge* v. *Warren Bridge*, 11 Peters, 420.

This power is one of the attributes of the sovereignty of the State, which is to be exercised by the Legislature itself, or by any agent whom that body may authorize to act for it. The County Courts were (120) selected as such agents by the Act of 1784 (chap. 227, sec. 1, of the Rev. Code of 1820), see Rev. Stat., chap. 104, sec. 1; Rev. Code, chap. 101, sec. 1; and plenary power of the subject was conferred upon them. *Smith* v. *Harkins*, *supra.* It is true that no authorized person can keep a ferry, or transport for pay any person or his effects, within ten miles of any ferry on the same river or water which theretofore may have been appointed. Rev. Code, chap. 101, sec. 30. We presume the same prohibition extends to the protection of a toll-bridge which may be erected in the stead of a ferry, under the provision of the twenty-eighth section of the act. But this does not take from the County Court the power to authorize the establishment of another ferry, or the erection of another toll-bridge at any place, no matter how near the former, which the public convenience may require; and of that the County Court is the sole judge. But this power of the court is necessarily subordinate to that of the Legislature, and wherever that body prohibits the grant of the franchise of a ferry or toll-bridge by the County Court at any particular place, it puts an end to the court's power of granting such franchise at that place. The defendants have proposed to avail themselves of this rule to defeat the present suit, and have accordingly produced an act of the General Assembly, ratified the 11th day of December, 1866, and accepted by the principal defendant two days afterwards, which expressly prohibits any other toll-bridge or any ferry from being placed within three miles of the Washington toll-bridge. The counsel for the plaintiffs objects that the act, which is entitled "An act to amend the charter of the Washington Toll-bridge Company" is a private one; that it was passed after the decision of this cause in the Superior Court; and that, being a private statute, this court can not take notice of it.

It must be admitted that if the statute be a private one we can not, on account of our organization as an appellate tribunal only, take judicial notice of it, (121) because there is no means by which it can properly be brought to our attention. See *State* v. *Rives*, 27 N. C., 297, at page 314. Aware of this difficulty, the counsel for the defendants contends that the act in question is a public statute—what is called a public local act. The distinction between a public and a private statute has always existed, is fully established and the line of demarcation is well defined, and yet it is in many cases difficult to determine on which side of the line a particular act must be placed. In the case at bar, however, we are saved the trouble of investigation, because it is settled by authority in this State that an act in relation to a particular ferry or toll-bridge is a private act. Thus the Act of 1858, chap. 11, which relates to the toll-bridge over the Perquimons River at the town of Hartford, was treated as a private act in the case of *Saunders* v. *Hathaway*, 25 N. C., 402. So, the Acts of 1764 and 1784, in favor of William Dry and Benjamin Smith, respectively, under the authority of which two ferries and a road across Eagle's Island, opposite the town of Wilmington, were established, were recently held to be private statutes. *Taylor* v. *Railroad*, 49 N. C., 277. As the act which the counsel of the defendants has proposed to bring to our attention can not be judicially noticed by us it can not have any effect upon our decision. We do not find any error in the record before us, and we must affirm the judgment of the court below. This decision will not preclude the defendants from bringing the act in question in a proper manner to the attention of the Superior Court and offering it as an objection to the granting of any order for the establishment of the proposed ferry.

As the matter stands here the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Bridge Co. v. *Commissioners*, 81 N. C., 503; *Durham* v. *Railroad*, 108 N. C., 402; *Bridge Co.* v *Flowers*, 110 N. C., 385; *Board Education* v. *Commissioners*, 111 N. C., 585; *Robinson* v. *Lamb*, 126 N. C., 497.

(122)

CICERO W. HILL v. DAVID W. BELL, and others.

1. That a paper-writing, propounded as a will, has upon it an attestation clause unwitnessed, will not prevent its being established as a holograph.

2. The placing of a holograph in a trunk, left for safekeeping with a friend, and having in it the larger part of the valuable papers and money of the deceased, will satisfy the requirements of the statute upon the point of deposit.

3. Where a deposition was found among the papers, with a commission unattached, and an envelope which appeared to have been sealed up and afterwards broken open: *Held*, that this was sufficient evidence to justify the clerk in finding that the deposition had been taken under such commission, and had been returned to him sealed up by the commissioner; and therefore that the clerk had done right in passing upon, and allowing such deposition to be read.

(*Harrison v. Burgess*, 11 N. C., 384; *Brown v. Beaver*, 48 N. C., 516; *Simms v. Simms*, 27 N. C., 684, and *Little v. Lockman*, 49 N. C., 494, cited and approved.)

CAVEAT, tried before his Honor, *Barnes, J.*, at Fall Term, 1866, of the Superior Court of Carteret.

The will in question had an attestation clause, but no subscribing witnesses; and it was duly proved to be in the handwriting of the deceased, one W. S. Ward. In regard to the place of deposit, it was shown that in the fall of 1862 the deceased was in the habit of spending his nights with one John W. Pelletier, and on one occasion brought with him a box and trunk, and desired Pelletier to take care of them, as they contained valuable papers Shortly afterwards he ceased living with Pelletier, but left the box and trunk with him, retaining the keys. In 1865 he returned to Pelletier's, but, a month before his death, he went to his sister's, saying that he had a presentiment that he should die. On going away he asked Pelletier to keep charge of his papers, saying that his will was among them signed by him but not witnessed, but that whether witnessed or not it was nevertheless his will; that his handwriting was well known and could be proved. He also
(123) said to Mrs. Hill, his sister, that he had carried

all his important papers to Pelletier for safe keeping, and his will was in his trunk there, repeating what he said above about its being not witnessed, but nevertheless his will.

The conversation with his sister was proved by her deposition, the reading of which was objected to because the commission, although among the papers, was not attached to the deposition; also because the deposition had not been returned to the clerk under seal. It appeared that a commission had regularly issued to take the deposition, and the clerk produced an envelope directed to him as clerk, in which he thought that the commission and depositions had been returned to him, and which had the appearance of having been sealed. The clerk had not previously passed upon the depositions, but was directed by the court to do so then. Having done this and indorsed his allowance thereof, the caveators appealed to the court, who permitted the deposition to be read.

After Ward's death the paper-writing now propounded was found in the trunk. Valuable papers and money were also found in both the trunk and box, some seventy-five dollars in "greenbacks" in the former and some twenty or thirty dollars in specie in the latter.

His Honor charged the jury that if the paper was found among the greater portion of the valuable papers of the deceased, the requirement of the statute in that respect was complied with, although a portion of his valuable papers and money may have been in another place. Also that when one writes a will and prepares an attestation clause for it, there is a presumption that he intended to have it witnessed, but such presumption might be removed by showing affirmatively that he had executed it in one of the other ways provided by law; that if the jury believed from all the evidence that the paper-writing was placed by the deceased among the greater part of his valuables, papers and effects, (124) or was lodged by him in the hands of another person for safe keeping, with the intention that it should be his last will and testament, then it would be their duty to find the affirmative of the issue, provided that all the other requirements of the statute had also been proved to their satisfaction.

Verdict for the propounder. Rule for a new trial. Rule discharged, and appeal.

Manly & Haughton, for the propounder.
Green & Perry, for the caveators.

BATTLE, J. The objections to the validity of the script propounded for probate as the last will and testament of William S. Ward were of two kinds: First, that the deceased intended to make and publish it as an attested, and not as a holograph will, and that therefore it was never so completed as to operate as a will; secondly, that if it were a holograph paper it was not found among the valuable papers and effects "of the deceased, nor was it lodged in the hands of some person for safe keeping."

1. The first objection is fully answered by the two cases of *Harrison* v. *Burgess*, 8 N. C., 384, and *Brown* v. *Beaver*, 48 N. C., 516. In the former it was held that the fact of there being the signature of one subscribing witness to a will of land did not prevent it from being proved as a holograph will; and in the latter, that it was no objection to the probate of a script as a holograph will that it had one subscribing witness, and was intended by the decedent to be proved by subscribing witnesses, which intent was frustrated by the fact that the second attesting witness was incompetent. The declaration made by the decedent in the present case, that he wished to obtain the subscription of witnesses to his will, though strengthened by an attestation clause, can not be of mere avail against its validity than was
(125) the actual attestation in the cases referred to. Besides, it was entirely proper in the Judge to leave it to the jury to determine whether, from all the circumstances, they believed that the paper-writing was deposited by the deceased among his valuable papers

with the intention that it should be his will. *Simms* v. *Simms*, 27 N. C., 684.

2. The second objection is equally unavailing. According to the evidence the trunk in which the script was found had papers and effects of value and of greater value than those in the box; and this trunk was legally in the possession of the decedent, though for the time deposited at the house of another person. The deceased did not deposit the script "in the hands" of that person for safe keeping, but he did place it among his own valuable papers and effects, where it was found after his death. The case of *Little* v. *Lockman*, 49 N. C., 494, in stating what is not a proper depository for a holograph paper, shows clearly that the one established by the testimony in the present case was just such a place as was in the contemplation of the statute. See Rev. Code, chap. 119, sec. 1.

The objection made to the admissibility of Mrs. Hill's deposition can not be sustained. There was sufficient testimony to justify the clerk in finding that there was a commission for taking the deposition, and that it had been returned to the court properly sealed up by the commissioner who took it. The clerk did right, therefore, in passing upon it and allowing it to be read. See Rev. Code, chap. 31, sec. 63.

No error being found in the judgment of the Superior Court, it must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Hughes v. *Smith*, 64 N. C., 494.

(126)

COOPER HUGGINS v. JOHN W. HINSON, Sheriff, etc.

1. The right of suing a sheriff to recover taxes that have been paid under protest, does not apply to taxes that have been collected by virtue of a tax list.

2. A tax list is of the nature of an execution.

3. Distinction as to the above right in cases where the tax is collected by a sheriff without a list, and with one, stated and explained.

4. The only remedy for a person who has been improperly assessed by the list-takers is that provided under the Revenue Acts.

(*Murchison v. McNeill*, 60 N. C., 217, and *Worth v. Commissioners of Fayetteville*, 60 N. C., 617, cited and approved; *Wynne v. Wright*, 18 N. C., 19, and *Davis v. Dashiel*, *ante*, 114, distinguished; *Bank of Cape Fear v. Edwards*, 27 N. C., 516, commented upon.)

CASE, brought to the Fall Term, 1866, of the Superior Court of Duplin, at which time the following case agreed was made up between the parties:

In December, 1865, the plaintiff had purchased in Ohio, and in January, 1866, had brought into this State a large quantity of spirituous liquors, one-half of which he had sold before the 12th day of March, 1866. The justice of the peace appointed by the County Court of Duplin to take the tax list for 1866, in the district in which the complainant resided, upon hearing this statement, listed the whole of said purchases for taxation. The County Court at its April Term, 1866 (after its January Term for that year had passed), levied a tax upon all articles of taxation double the rates of the State tax. The County Court Clerk, in making out the tax list, charged the complainant upon his purchases above with a State tax of $1,014.90, and a county tax of $2,029.80, amounting in the aggregate to $3,044.70. This list came into the hands of the defendant as sheriff, who forced the complainant, against his will and protest, to pay over to him the taxes charged as above.

It was agreed that if the court were of opinion (127) for the complainant, he should have judgment for $3,044.70, as above, or for such other sum as the court should or might be of opinion had unlawfully been collected by the defendant; otherwise that judgment should be given for the defendant.

Upon consideration, his Honor, *Barnes, J.*, was of opinion that the complainant was liable to pay tax only on so much of the spirituous liquors as were in his possession on the 1st of April, 1866, and gave judgment for him for the sum of $1,522.35, and costs. And from this judgment the defendant appealed.

Strong, for the complainant.
Phillips & Battle, for the defendant.

An action can not be maintained against a sheriff to recover taxes collected by him under a tax list, whether paid under protest or not. The list is an execution, and therefore the principle of *Weaver* v. *Cyer*, 12 N. C., 337, and *Marriott* v. *Hampton*, 2 Sm. Lead. Cas., Am. note, applies. *Osborne* v. *Danvers*, 6 Pick., 98; *Downer* v. *Woodbury*, 19 Vt., 330; *Sumner* v. *Dorchester*, 4 Pick., 361; *Chegaray* v. *Jenkins*, 5 N. Y., 376.

The whole system of accounts between the comptroller and the sheriff would be disordered by the toleration of such obstructions as must result from suits of this sort. See that system in the Revenue Act of 1866, chap. 22, secs. 25, 33, 37–44, 46 and 89.

The complainant's remedy for the alleged grievance is to be found only in secs. 39 and 40, above. Of this he did not avail himself. Whereupon, the lists were made up by the clerk as returned by the list taker, and this was equivalent to a judgment; and when these lists came into the hands of the sheriff they constituted an execution.

The principle stated in *Worth* v. *Commissioners*
(128) *of Fayetteville*, 60 N. C., 617, applies only in cases where a sheriff (as say, under Schedule C.), collects upon his own judgment as to the liability of the party.

PEARSON, C. J. This is an action on the case, "for money had and received," to recover money collected for taxes by duress, and paid under protest.

Mr. Phillips insisted that the action could not be maintained, and took this distinction: When it is left to the judgment of the sheriff to decide whether a tax is due and what amount, and he collects when no tax is due, or collects more than is due, the remedy is to pay under protest and recover back the amount wrongfully exacted, by an action for "money had and received"; but when the subjects of taxation are required to be listed, and the tax list is put in the hands of the sheriff for collection, that is an execution. No action will lie against him for collecting the amount on the list, and the only remedy is to apply to the County Court, under whose authority and supervision the tax list is made out, to have it corrected according to the provisions of the Revenue Act.

The point has not heretofore been made in our courts; but, after much consideration, we are satisfied the distinction is well taken.

That an action on the case, "for money had and received," is the appropriate remedy in the first class of cases, like the taxables set out in Schedule B in the Act of 1866, chap. 22, is settled. Brown on Actions, 364; *Murchison* v. *McNeill*, 60 N. C., 217; *Worth* v. *Commissioners of Fayetteville*, 60 N. C., 617, where it is assumed to be settled.

When the articles liable to taxation and the amount to be collected is not fixed, but is left to depend upon the judgment of the sheriff, and he acts upon his own responsibility and knowledge of the facts, and proceeds by virtue of his office, if he errs the law does not allow him to be treated as a trespasser, but has adopted (129) the mildest form of action in order to give the taxpayer a remedy and provide a way in which the question can be brought up for judicial determination. But in order to entitle himself to this remedy the party must pay the money under protest, so that the sheriff may know before he pays the money over, that the matter is disputed, and have an opportunity to consult counsel and pay the money back if satisfied of his error, or if doubtful may retain it as a stake holder, subject to the result of the action.

It is proper to remark that *Wynn* v. *Wright*, 18 N. C., 19, is the only case we have met with where trespass is brought. In that case the court decided for the sheriff upon the merits, and it did not bcome necessary to notice the form of action. The same remark may be made as to the case of *Davis* v. *Dashiel*, *ante*, 114.

In regard to the other class of cases, where the taxables are required to be listed under the authority and supervision of the County Court, as the articles set out in Schedule A, Act of 1866, chap. 22, under which class our case falls, different considerations and a different state of facts are presented. A justice of the peace is appointed by the County Court to take the list of taxable property in each captain's district. This list is to be returned to the County Court and recorded at length, and the clerk is to add to the taxables of each person the amount of tax for which he is liable, and to set up the list in some conspicuous place at the court-house, and is to return to the comptroller of the State an abstract of the same. It is further provided that if any one is overrated, the County Court may, on application, reduce the amount, and direct the clerk to give a certificate stating the amount deducted, which certificate the sheriff shall receive; and upon handing it to the comptroller, a deduction of the amount stated shall be made by him from the tax to be accounted for by (130) the sheriff. It is also made the duty of the clerk to deliver to the sheriff an accurate copy of the tax list, and the sheriff is required to collect the same.

The tax list is a judgment against every person for the amount of the tax, and the copy delivered to the sheriff is an execution put into his hands commanding him to collect the amount, and he is charged with it on the comptroller's books. So the sheriff is just as much bound to make the collection as he is to collect the amount of an execution issued on an ordinary judgment.

Take another view: Suppose the sheriff should not collect any part of the tax, or should make a deduction, or if he refuses to do so, suppose the taxpayer is allowed to recover it from the sheriff in an action, how is he to get a credit for it in his settlement with the comptroller?

It is suggested he may apply to the Legislature for relief; but why this circuity: and in what embarrassments would sheriffs be involved? To avoid this very state of things the law provides a plain remedy, by allowing the taxpayer to apply to the County Court and have the matter corrected; and it would defeat the purpose of the State to allow an action.

These considerations make it manifest that the action for "money had and received" is not applicable to the case of listed taxables, and the complainant has misconceived his remedy.

This conclusion is fully sustained by the authorities cited by Mr. Phillips in his very able and learned argument. *Osborne* v. *Danvers*, 6 Pickering, 98, *et al.*

The only case that our researches have enabled us to find that "looks the other way" is one in our own State reports. *Bank of Cape Fear* v. *Edwards*, 27 N. C., 516.

In that case Edwards, the Sheriff of Wake, collected of the complainant $100, assessed on the banking house for State and county taxes. The complainant recovered it back in assumpsit for "money had and re-
(131) ceived" But the point was not made that the action did not lie. The attention of the court was not called to the distinction now taken, and the only purpose of the parties seems to have been to try the question, whether the bank was liable to pay any public tax, either State or county, except 25 cents on each share of stock owned by individuals; and the point was presented in a case made up for that purpose alone. So it can not be considered an authority in support of the remedy by action, and be allowed to establish the right to maintain an action in such cases, in opposition to "the reason of the thing," and the many cases cited on the argument, in which the point was directly made, and fully considered.

Per Curiam. Judgment reversed, and, in accordance with the case agreed, judgment for the defendant.

Cited: Commissioners v. *Piercy*, 72 N. C., 181; *London* v. *Wilmington*, 78 N. C., 109; *Gore* v. *Martin*, 66 N. C., 372; *Railroad* v. *Lewis*, 99 N. C., 64; *Commissioners* v. *Murphy*, 107 N. C , 38; *Guilford* v. *Georgia*, 112 N. C., 36; *Davie* v. *Blackburn*, 117 N. C., 385; *Mulford* v. *Sutton*, 79 N. C., 278.

FRANKLIN A. WILEY, Ex'r, etc., v. JOHN H. WILEY, and others.

1. The act of 1846, c. 1, (Code, c. 46, s. 44), giving to an executor a right to file a petition to sell real estate, etc., does not apply to a case in which he has full power to sell such estate under the will.
2. Nor does it apply in such case, even if the executor has by accident lost the personal estate of his testator, and, for that reason alone, desires to resort to the realty, his remedy in such case being only in equity.
3. The remedy provided by the act applies only to cases in which otherwise the creditor would be compelled to resort to a *scire facias* against the heirs.

Petition to make real estate assets, filed to October Term, 1866, of Caswell County Court, when a demurrer put in by the defendant was overruled. From this order the defendants appealed to Fall Term, 1866, (132) of the Superior Court, when his Honor, *Fowle, J.*, sustained the demurrer. Thereupon the petitioner appealed to this court.

The facts are sufficiently stated in the opinion.

Ruffin, for the appellant
Phillips & Battle, *contra*.

Battle, J. This is a proceeding by petition, filed in the County Court by the executor of Alexander Wiley, for the purpose of obtaining an order to sell a part of the real estate of the deceased, with the proceeds of which to pay his debts. It is admitted by the executor that the will gave him full power to sell any part of the estate of his testator, whether real or personal, for the purpose of paying his debts; and he admits further, that he did sell a sufficiency of the personal property to satisfy all the demands against the estate, but he avers that at the time of the sale he was compelled to take Confederate Treasury notes, they being then the only currency in the State, and that some of the creditors refused to take them in payment of their debts. In consequence of which he was compelled to keep them until they became valueless. As these debts, as well as the costs of administration, are still unpaid, and there are no personal assets to which he can resort for their payment, he insists that he has a right to adopt this proceeding, under the authority of the Act of 1846, chap. 1 (Rev. Code, chap. 46, sec. 41, and several sections following). The demurrer raises the question whether the County Court is authorized by that act to order the sale of land upon the petition of an executor under such circumstances.

The words of the forty-fourth section of the act are: "When the goods and chattels of any deceased person in the hands of his executor or administrator, shall be insufficient to pay all his debts, with the charge of administering the estate, his executor or administrator shall sell his real estate upon obtaining a license there-(133) for, and proceeding therein in the manner hereinafter provided." In the following sections the mode of proceeding is pointed out, which is, a petition in the County or Superior Court of the county in which the executor or administrator qualified; and then follow the details of the plan for converting the real estate into assets, and the manner of administering them. It is contended for the defendants that this act does not apply to the case of an executor who has full power by the will to sell real as well as personal estate for the purpose of paying the debts of his testator, particularly when he has so acted as to put it out of his power to resort to the personal property for that purpose. This makes it necessary for us to consider what is the proper construction of the act. The first rule laid down by Blackstone for the interpretation of a statute is to consider what was the former law, the mischief, and the remedy; that is, how the law stood at the making of the act; what the mischief was for which the former law did not provide, and what remedy the Legislature hath provided to cure this mischief. 1 Black. Com., 87.

Before the passage of the Act of 1847, which is now contained in the Rev. Code, chap. 46, a creditor of a decedent's estate had first to resort to and exhaust all the personal assets, and had then to proceed against the lands which had descended to the heirs, or passed to the devisees of the intestate or testator. The mode of proceeding was by means of a *sci. fa.* against the heirs or devisees or both, and was in practice found to be very dilatory for the creditor, and always very expensive, and often ruinous to the estate of the decedent in the hands of the representatives.

Such was the state of the law and the mischief under it, when the act in question was passed. It provides a simple, speedy and comparatively cheap plan for having a decedent's debts paid, first out of his personal property so far as it will go, and then out of the proceeds of the real estate, if it should be found nec- (134) essary to resort to that.

When the executor has full power under the will to sell both kinds of property for the payment of debts, it is manifest that there is no necessity for him to call in the aid of the statute. As to the estate represented by him there did not exist any mischief under the former law, and we therefore conclude that the Act of 1846 was not intended to apply to such a case as his. If this be so, then it is clear that if, in attempting to apply the personal assets first, to the payment of the debts of his testator as it is his duty to do (*Knight* v. *Knight*, 59 N. C., 134), they are lost, he can not proceed under the act to obtain an order for the sale of the land. The loss must fall on him, unless there be equitable circumstances which entitle him to relief, and that can be given him in a Court of Equity only.

The demurrer was properly sustained in the court below, and the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: *Wiley* v. *Wiley*, 63 N. C., 182; *Finger* v. *Finger*, 64 N. C., 186; *Wood* v. *Skinner*, 79 N. C., 94.

THE STATE v. MURDOCK MERRITT and MARION MERRITT.

1. An indiscriminate assault upon several persons is an assault upon each.

2. The facts being that the gun in question was fired by one of two defendants, whilst the other was present aiding and abetting: *Held*, that a charge in the indictment that both committed the assault was thereby made good.

ASSAULT *with intent to kill*, tried before his Honor, *Barnes, J.*, at Fall Term, 1866, of Duplin.

The indictment charged that both of the defendants made an assault upon Lipman Aarons, with an intent to kill him.

(135) The evidence showed that whilst Aarons and his wife, daughter and son were sitting one night upon the front piazza of his house, during the fall of 1866, a gun was fired at them, the shot passing between them and lodging in the wall of the house. The other evidence consisted of circumstances and confessions, and showed that the defendants were together at the time the gun was shot by one of them.

Under the charge of his Honor the jury found the defendants guilty; and thereupon, having moved for a new trial unsuccessfully, and having been sentenced, they appealed.

Attorney-General, for the State.
No counsel for the defendants.

READE, J. There was no specific instruction prayed for, and no specific exception taken below or in this court. We are therefore left to collect from the whole of the Judge's charge and from the record, whether there was any error.

Only two questions seem to be involved:

1. Whether an indiscriminate assault upon several is an assault upon each individual? Very clearly it is.

2. Whether, when a gun is fired by one defendant, and the other is present aiding and abetting, the shooting may be charged to have been done by both? The act of one is the act of both, and it may be so charged.

Let it be certified that there is no error.

PER CURIAM. There is no error.

Cited: State v. *Nash*, 86 N. C., 652.

(136)

WILLIAM W. CRAWFORD v. THE BANK OF WILMINGTON.

1. The return of a sheriff upon process served on the officer of a corporation need not designate the office filled by such person: In any event such return is cured by judgment.
2. The stay law of September, 1861, under which a defendant was "not compelled to plead for twelve months from the return term," did not excuse him from entering an appearance at such return term, and then asking for time to plead.
3. A cause of action on bank bills does not accrue until a demand and refusal.
4. Bank bills bear interest only from the time of demand and refusal.

(*Davis v. Shaver*, and *Sharpe v. Rintels*, *ante*, 18 and 34, cited and approved.)

MOTION to set aside a judgment, allowed by *Barnes*, *J.*, at Fall Term, 1866, of the Superior Court of Wayne.

The complainant had sued out a writ in *assumpsit* against the defendant, returnable to Fall Term, 1864, and the return by the sheriff was, "To hand, August 30, 1864, served a copy of the within on Col. John McRae." At the return term a judgment was taken by default final, for an amount which covered the principal and interest of the bank notes sued upon, counting interest from the dates at which such notes had been issued (4th April, 1856), instead of the time at which they had been protested (5th March, 1864). Upon this judgment execution had issued and been levied on land belonging to the defendant.

At Spring Term, 1866, motions were made to set aside the execution; to set aside the judgment by default; to reform the judgment, and to retax the costs. These motions having been continued to Fall Term, 1866, the last was not then pressed, and, upon consideration of the others, his Honor declined to grant the motion to set aside the execution, but allowed the motion to set aside the judgment.

From this order only an appeal was taken by the complainant, and as thereby the other motions (137) were not brought before this court, only so much of the statement is given above as relates to the motion to set aside the judgment.

Strong, for the complainant.

1. The object of the statute (Code, p. 137, sec. 24), is to prevent a general return, and to let the complainant know on whom the writ was served, so that he can determine upon the propriety of such service. Its words are, "an officer," and not what officer.

2. The stay law of September, 1861, does not excuse from appearance, which is a different thing from pleading. The former law required defendants to appear, and plead (Code, chap. 31, sec. 57). This law excuses only from the latter. Such has been the uniform practice in the case of executors, etc., who wished time to plead, and the language of the act in their case is iden-

tical with that under consideration. Compare Code, chap. 46, sec. 33, and Stat., chap. 10, sec. 3, 2d extra session, 1861.

3. The stay law was unconstitutional; for it granted delay whether necessary in the particular case or not, and, upon its own principle, might as well have granted it for ten years as for one Besides, it drew a distinction between suits to recover interest and those to recover principal. The former law as to the time of entering pleas has existed since the last century. Sections 10, 16 and 19 show its unconstitutionality upon their face. *Jones* v. *Crittenden*, 4 N. C., 55; *Barnes* v. *Barnes*, 53 N. C., 366.

4. This judgment therefore being regular, can not be set aside. *Davis* v. *Shaver*, *ante*, 18; *Sharpe* v. *Rintels*, *Ibid.*, 34; Tidd, 1, 568.

Person, for the defendant.

BATTLE, J. This was a motion to set aside a judgment taken by default in the Superior Court of (138) Wayne, and was based upon several grounds, of which only two have been insisted upon in this court.

1. It is insisted, in the first place, that the writ was not served upon an officer of the Bank of Wilmington as directed by the twenty-fourth section of the twenty-sixth chapter of the Revised Code. That section directs that the process shall be served upon the president or other head, cashier, treasurer or director of the company. The return of the sheriff in the present case was, "Served a copy of the within on Col. John McRae." It is admitted that Col. John McRae was the president of the bank, but it is contended that the fact that he was so ought to have been set forth in the return.

The object of the law was to give notice to the company of the suit brought against it, and that was accomplished by leaving a copy of the writ with one of its officers, whether the return stated his name simply, or stated it with the addition of his official character.

In either case, if the court were not satisfied that the process was served upon an officer of the company, it might call for affidavits to prove the fact, before suffering a judgment by default to be taken. But even admitting that the return in this case is not strictly formal, it is certainly cured after judgment by force of the Revised Code, chap. 3, sec. 5. One of the defects of process, which by that act is made good after a judgment, is "any imperfect or insufficient return of any sheriff or other officer."

2. It is contended, in the second place, that by the Act of 1861, second extra session, chap. 10, sec. 3, the defendant was "not compelled to plead for twelve months from the return term," and that therefore the judgment which was taken at the return term was irregular and void. To this the complainant replies that the defendant was bound to enter its appearance by attorney before it could claim the benefit of the act with regard to the time for pleading. But the defendant (139) contends that appearance and pleading mean the same thing, and that therefore it was not bound to appear and enter its pleas until the expiration of the time specified in the statute. We are clearly of opinion that in this conflict of argument the complainant is right. According to the principles of pleading, as laid down in all the works on the subject, appearance is a distinct act from pleading, and must always precede it; and in the construction of the act referred to, we must presume, until the contrary appears, that the well-known order of proceeding in a suit was intended. This order is recognized and enforced by our statute law. In the Revised Code, chap. 31, sec. 37, the following, among other "Rules of Court," are laid down: "(1) The complainant shall file his declaration, etc. (2) The defendant shall appear and plead or demur at the same term to which the writ is returnable, otherwise the complainant may have judgment by default, etc.: *Provided*, That where the nature of the action requires special pleading, the time for pleading may be enlarged." Here appearance and pleading are evidently spoken of

as distinct acts, of which the former must precede the latter. It is manifest, too, that the defendant must appear, that is, enter his appearance upon the docket, and then crave the enlargement of the time for pleading upon showing that the nature of his action requires special pleading. So under the Act of 1861, chap. 10, sec. 3, the defendant must enter his appearance at the return term of the court, and then demand the extended time for pleading given in the act. Our conclusion is, that the judgment by default, having been properly taken according to the regular course and practice of the court, ought not to have been set aside. *Davis* v. *Shaver*, *ante*, 18; *Sharpe* v. *Rintels*, *ante*, 34. For this cause the order made in the court below must be reversed.

From the statement of the case made by his Honor the presiding Judge, and sent to this court, it (140) appears that the judgment was taken for too much interest. The action being founded upon the promissory notes of a bank, the cause of action did not accrue until a demand and refusal, and the notes did not begin to bear interest until that time.

The counsel for the complainant has agreed to remit the excess, and it is therefore unnecessary for us to take any further notice of this point, even if we could do so upon this appeal.

PER CURIAM. Order reversed.

STATE v. CHARLES JOHNSON.

An ordinary railroad is not a public highway within the meaning of the Revised Code, ch. 34, sec. 2, punishing with death robbery in or near a public highway.

HIGHWAY ROBBERY, tried before *Merrimon, J.*, at Fall Term, 1866, of the Superior Court of Wake.

The prisoner was indicted for robbing one Solomon Greeson. The indictment was in two counts, one charging the offence to have been committed in, and the other near, the public highway.

It was proved that Greeson was assaulted and robbed by three persons while walking along the North Carolina Railroad, near the city of Raleigh.

The evidence that the prisoner was one of the persons who robbed Greeson was circumstantial.

His Honor ruled that the North Carolina Railroad was a public highway, and charged the jury that if they were satisfied beyond a reasonable doubt, that the prisoner robbed said Solomon Greeson on or near the North Carolina Railroad, or that he was present at the (141) robbery, aiding and abetting, he was guilty of the crime charged in the bill of indictment. Defendant excepted.

Verdict of guilty. Judgment of death, and appeal.

Attorney-General, for the State.
Haywood and *Badger*, for the prisoner.

1. The North Carolina Railroad is no "highway" within Rev. Code, chap. 34, sec. 2. It is only *quasi; i. e.*, private property may be condemned for it as in *Davis* v. *Railroad*, 19 N. C., 451; its obstruction is a common nuisance, as in *State* v. *Rives*, 27 N. C., 297; for in these cases is illustrated the flexibility of the common law adapting itself to changes and improvements. But here the question is as to the flexibility of a highly penal statute. Can such a statute be extended by construction to embrace cases entirely beyond the contemplation of those who passed it? The language of our Code is copied from the English Statutes of 23 H. VIII, chap. 1, sec. 3, and 1 Edw. VI, chap. 12, sec. 10; and our railways are certainly not identical with "highways" as known at their enactment. For, in case of a railroad the franchise of way is in the company; the right of the public to pass is only *sub modo*, on trains, and as the company chooses; the company may enclose

their track and to some extent obstruct it; and the soil under the way belongs to the company. In case of a highway, the right-of-way is in the public; they may use it at all times and under all circumstances; no one can enclose or obstruct it; and the soil belongs to the adjacent proprietors. Such are only some of the material distinctions, and we submit that it is enough for our purpose, some.

2. Penal statutes are to be construed strictly. See 1 Bl., 88, and various illustrations in *State* v. *Knight*, 3 N. C., 109; S. C., 1 N. C.; *Wardens, etc.*, v. *Sneed*, 5 N. C., 485; *State* v. *Kearney*, 8 N. C., 53; *Smithwick* v. *Williams*, 30 N. C., 268. Now there are three sorts of ways, *Iter*, *Actus* and *Via*. Co. Litt., 56a, (142) Bac. Ab., Highway (A). Any of these that is common to all the King's subjects may be termed a highway. *Ibid.*, Vin. Ab., *Chimin Commun*, A, sec. 3. "Highway" is used in two senses to denote the *genus* of all public ways; and again one species of them, viz: *Alta via regia*, the Great Highway. Vin. Ab., *Ibid.*, sec. 4; *Railroad* v. *Saintiff*, 6 Mod., 255. The English statutes above take away benefit of clergy from robbery in or near the highway, which in these acts is held to be only the *Via*, although the other ways are open to all subjects, and at that the special *Via* above named; so that one indicted under the Act of Hen. VIII (above), for robbery in *via regia pedestri*, was allowed Clergy. Hal. P. C., vol. 1, 535, and vol. 2, 349; 2 Haw. P. C., 476. So here the proof of robbery "on or in the N. C. R. Road, within the county of Wake, and that said road was an ordinary railroad," does not bring *quasi* highway within the statute under which the indictment was framed.

3. The reason for depriving highway robbery of clergy does not apply to the case of robbery like the present. To bring robbery on railways at all within that reason, the person robbed must be using the railway as a passenger in the cars. We do not admit that even this would answer. Highway robbery (*insidiatio viarum* was excluded from clergy at common law previously to

Statute 25, Edw. III, *Pro clero;* 4 Bl., 373; 1 Chit. Cr. Law, 675; 2 Hale, 333. The Statute *Pro clero* gave clergy for any treasons or felonies not touching the King himself or his royal majesty." Yet a construction prevailed after this that *insidiatores viarum* might be denied it. Hale & Haw , *ubi supra.* The reason assigned being that it was a sort of hostile act and bordered upon treason. 4 Bl., 373; 1 Ch. Cr. L., 675. Upon complaint of this to Parliament, the Stat. 4, H. IV, chap. 2, granted it to them. The reason above grew out of the fact that the King had a right of passage for himself and for all his subjects. Comyn, Chemin (143) (A, 2), page 27. Where highways are unsafe, the whole country is in peril. The policy of this security applies only to places where every citizen has a right to pass and repass at pleasure; particularly to such upon which every man is sometimes compelled to be; and to transport articles of value; and expose such at lonely places; at the same time that the robber himself can not be excluded from being thereupon, having the right to pass and repass as well as others, and being under the protection of the sovereign in the enjoyment of his right.

4. None of these reasons apply to a robbery committed, as here, upon one casually standing or walking upon a railroad; many of them do not apply even to passengers upon railway trains.

PEARSON, C. J. There is error. The evidence did not prove the allegation in the indictment—that the robbing was committed "in the common and public highway of the State," and the court erred in ruling "that the said road is, and was at the time of such robbery, a highway."

The benefit of clergy is taken from the offence of robbing any person in or near any public highway. Statutes Hen. VIII, and Ed. VI, re-enacted, Rev. Stat., chap. 34, sec. 1, and also re-enacted, Rev. Code, chap. 34, sec. 2, in connection with sec. 22.

These statutes, from the earliest time, have received a uniform construction, by which it is held, that although, at the date of the passage of the original acts, there were three sorts of public highways—one called "*iter*," over which the people passed on foot; another called "*actus*," over which they passed on foot or on horseback; and a third called "*via*," over which they passed on foot or on horseback, or in vehicles with wheels. Coke Lit., 56, a, b; and although the statutes use the words "public highway," still they do not embrace any but the last kind—the "*via*, or by way (144) of preeminence, the highway. 1 Hale, 535, *Ibid.*, 333; 2 Hawk., 476; 4 Blackstone, 373. For it was considered that the mischief intended to be remedied existed in a special degree in regard to the "*via*," or highway of most importance; that is, those over which all of the King's subjects were at liberty to pass and repass on foot, on horseback, and in carriages; and it was resolved by the Judges that a statute so highly penal, and affecting human life, should be confined to the most important kind, and could not, by construction, be made to include the two other kinds, notwithstanding the mischief in some degree extended to them.

Such being the known construction of these statutes, at the time they were re-enacted in this State, it follows, as a matter of course, that our courts must continue them in the same manner, and confine their operation to that kind of public highway over which all of the citizens are at liberty to pass and repass, on foot, on horseback, and in carriages and wagons.

Plankroads or turnpikes adopted by law and used for these three purposes as public highways, it would seem, come within this construction, because the fact that the agency of individuals or of corporations is used for the purpose of constructing and keeping in repair these kind of public highways in nowise affects the principle or the policy of the statute.

But with respect to railroads the case is different, and other considerations are involved. A railroad is a public highway, *sub modo*, to be used as such only for a special purpose—that of transporting passengers and freight along the road in cars.

It is not free for all the people of the State to pass and repass over, on foot, on horseback, and in carriages and wagons. and the prevention of robbery on a highway of this kind by the penalty of death; is
(145) neither within the principle nor the policy of the
statute. Whether, if a robbery should be committed in a car while passing along the track, the offence would come within the statute is a question not now presented, and indeed is one not likely to be presented; for the number of passengers and persons on board takes away all facilities and temptation to commit the offence. Ours is the case of a robbery committed on an individual who had no right to be upon the road; he was a trespasser, and, if forbidden, might have been indicted for a misdemeanor in being there, according to the provisions of the charter of the company, and it is difficult to conceive of any reason why he should be considered more under the protection of the law than if he had been walking in a field, or through the woods. Certainly there is none in respect to the individual or the place, and it is equally certain there is none in respect to the public. The proposition that the offence does not come either within the principle or the policy of the statute, can not be made plainer by a more elaborate discussion.

PER CURIAM. There is error, *venire de novo.*

Cited: Boyden v. *Achenbach*, 79 N. C., 540; *Kennedy* v. *Williams*, 87 N. C., 8; *State* v. *Wolf*, 112 N. C., 894.

(146)

STATE v. JOHN B. SEARS and PASCHALL SEARS.

1. Whether the doctrine of reasonable doubt applies to misdemeanors or not, a charge that, to convict, the jury must be "fully satisfied" of the defendant's guilt, is all that he has the right to ask.
2. Reasonable doubt is not a necessary formula, and it can only be required in any case that the Judge impress upon the jury the principle that the innocent must not be punished.
3. In an indictment for malicious mischief it is sufficient to charge the jury that they must be "satisfied" as to the ownership of the property injured.
4. It is not a ground for arrest of judgment that the defendant was convicted upon an indictment found by a grand jury in 1863, while the rightful State Government was suspended.
5. An indictment is a judicial proceeding within the meaning of the Ordinance of the Convention of 1865, entitled "An Ordinance declaring what laws and ordinances are in force," etc.
6. The Convention in adopting that Ordinance did not exceed its powers; nor is the Ordinance in the nature of an *ex post facto* law.
7. The proper time for an objection to the grand jury that found an indictment is before the trial.

MALICIOUS MISCHIEF, tried before *Merrimon, J.*, at Fall Term, 1866, of the Superior Court of Wake.

The defendants were indicted at Common Law for maliciously killing a mule, the property of one Robert Williams. The bill was found at Fall Term, 1863.

The evidence of the killing, by the defendants, was circumstantial, and his Honor charged the jury that, to convict, they "must be satisfied, fully satisfied," that the mule was killed by one of the defendants, moved by malice to the owner, and that the other was present, aiding and abetting in the killing, moved by like malice; and they must be "satisfied" that Robert Williams was the owner of the mule.

The counsel for the defendants asked his Honor to charge that the jury, to convict, must be satisfied (147) of the guilt of the defendants "beyond a reasonable doubt." The court refused so to charge, and the defendants excepted for misdirection.

There was some evidence that the mule had been occasionally mischievous, and the counsel for the defendants below asked the court to charge that he was a nuisance and the defendants had a right to kill him, though not engaged in mischief the day he was killed. The court refused, and the defendants again excepted; but this ground of exception was abandoned in this court.

Verdict of Guilty as to both defendants. Rule for a new trial. Rule discharged. Judgment, and appeal.

Attorney-General, and *Phillips & Battle*, for the State.
Haywood, for the defendants.

READE, J. The defendants' counsel asked the court to charge the jury "that they must be satisfied beyond a reasonable doubt," etc. His Honor declined to give the instructions. It is not stated whether he refused because he did not think the instructions proper in themselves or because he had already substantially given them.

Whether the doctrine of reasonable doubt, as it is commonly called, applies to misdemeanors, or only to capital cases *in favorem vitæ*, seems not to be settled in this State. There are *dicta* on both sides of the question; and as an additional *dictum* would but add to the uncertainty, we prefer to leave the question as it is until it shall be directly presented for decision.

In this case we think his Honor did, substantially, give the instructions asked for; and having given them substantially, he was not obliged to repeat them specifically.

His Honor had charged the jury that "they must be satisfied, fully satisfied," etc. "Fully satisfied" is at least as favorable for the defendant as "satisfied (148) beyond a reasonable doubt." For the latter implies that there may be a conviction, although there be ever so many doubts other than reasonable. But fully satisfied is to the exclusion of all doubts, reasonable or other. It is said that it is difficult for the jury to understand what "fully satisfied" means. It is at least as difficult for them to understand what "reasonable doubt" means. The error consists in supposing that any particular formula of words is necessary, or that any have been prescribed.

It is a great first principle, founded in justice as well as in humanity, that the innocent shall in no case be punished. It follows that before any one can be punished there must be a certainty of his guilt.

Inasmuch, then, as a doubt required an acquittal, it was necessary to define doubt, and especially to define the kind of doubt which should operate as an acquittal; for doubts are of as many grades as there are grades from an atom to a mountain, and of as many degrees as there are degrees from a shadow to the substance. They are "slight," "trivial," "fanciful," or on the one side; "reasonable," "substantial," "grave," on the other. Must a doubt like an atom or a shadow acquit? Or if the doubts were graded by numbers from one, the smallest, to a thousand, the largest, would the smallest acquit? or if not, what number in the ascending scale would?

Hitherto the mind has not been sufficiently subtle, nor language sufficiently precise, to lay down any inflexible rule or specific formula of words. That it must be a reasonable doubt is usually accepted as a sufficient, but not the only, definition. "Fully satisfied" is just as good a definition of that state of mind in which it is safe to convict. Whenever it appears that the Judge has been careful to impress upon the jury the great principle, that the innocent must in no case be convicted, we must hold that to be sufficient, without regard to the particular form of language
(149) which may be used.

In regard to the title to the property on which the malicious mischief was perpetrated, his Honor charged the jury that they must be "satisfied," etc. And it is objected that this was as much as to say that they need not be fully satisfied upon that part of the case. We rather think that after he had explained that by satisfied he meant fully satisfied, the explanation followed the word without being repeated. But whether that be so or not was not material, because as to the ownership of the property it was sufficient that they should be satisfied.

The indictment in this case was found at Fall Term, 1863, and it is insisted by the defendants that at that time there were no courts in North Carolina; that the tribunals claiming to be such were usurpations. It may be admitted, for the sake of the argument, that there were no courts in the rightful government, but there was an organized *de facto* government, with the same system of courts which we have now, and the indictment was regularly found by a grand jury in the proper court under that government. Subsequently that *de facto* government gave way to the present rightful government; and the paramount law of the public good may well be supposed to have transferred the proceedings in those courts to the succeeding courts in this government.

But the validity of the indictment does not depend upon that view of the case, because the ordinance of the Convention of 1865 expressly recognized and validated the proceedings of the courts of the *de facto* government as follows:

"All the judicial proceedings had, or which may be had, in the courts of record, and before justices of the peace, shall be deemed and held valid, in like manner, and to the same extent, and not otherwise, as if
(150) the State had not on the said day, or since, attempted to secede from the United States."

To the application of this ordinance the defendant objects, that an indictment is not a judicial proceeding.

We think that it is literally and technically a judicial proceeding, and certainly it is within the fair construction of the ordinance; for it could not have been the purpose to validate trials, convictions and punishments, and not the indictments upon which they were founded.

It is further objected that if the ordinance embraces indictments, then the ordinance is itself invalid, as exceeding the powers of the Convention.

The defendant's counsel favored us with an able argument upon the powers of the Convention, the authority by which it was called, the President of the United States, the extent of the President's powers, the limitations in the proclamations of the President and the Provisional Governor, etc., etc., embracing the general proposition that the Convention was limited to the duty of setting in operation the State government.

Conceding the proposition, for the sake of the argument, it would not follow that the validating the pending prosecutions for crimes was not a part of that duty. It would seem that the safety of society required that criminals should not be turned loose in the very infancy and weakness of the reorganized State.

But, without pursuing the argument, we do not admit that the powers of the Convention were limited, except by the Constitution of the United States.

Supposing that to be so, then it is insisted that the ordinance is an *ex post facto* law, which is forbidden by the Constitution of the United States.

An *ex post facto* law is the making an act criminal which was not so at the time of its commission. Certainly the ordinance has no such effect as that. (151) It only provides the means by which a criminal may be brought to answer for that which was a crime when committed

We have not overlooked the fact that the proper time for the defendant to have made these objections was before the trial. If there had been more force in them than we have been able to perceive, they would not be favorably entertained after the defendant has taken the chances of a trial without objection.

There is no error.

This opinion will be certified to the court below that there may be judgment and execution.

PER CURIAM. There is no error.

Cited: *State* v. *Knox*, *post*, 314; *State* v. *Parker*, *post*, 477; *State* v. *Kearzey*, *post*, 483; *State* v. *Debnam*, 98 N. C., 718; *State* v. *Brabham*, 108 N. C., 797; *State* v. *Rogers*, 119 N. C., 796; *State* v. *Hicks*, 125 N. C., 638.

THE STATE v. CALVIN SOWLS.

1. The distinction between robbery and forcible trespass is, that in the former a felonious intention exists, and in the latter it does not.
2. The question of felonious intention, is one for the jury, acting under such instructions from the Court as each case may require.
3. If, in March, 1865, one, who *bona fide* thought that he was acting under the orders of a captain of the Home Guard, went to a dwelling-house, and forcibly possessed himself of a sword, not for the purpose of appropriating it but solely to disarm the prosecutor: *Held*, that it would not have been robbery.
4. Illustration of the difference in the duty of the court in cases where there is slight evidence, and in those where there is none.
5. By PEARSON, C. J., concurring, forcible trespass is the taking of the personal property of another by force; robbery, the *fraudulent* taking of the personal property of another by force.

ROBBERY, tried at Fall Term, 1866, of the Superior Court of Columbus, before his Honor, *Gilliam*, *J.*

Upon the trial it was shown that the defendant, with three others, armed with guns, went to the house (152) of one Stanly, in his absence, his father and his wife being there, and asked if Stanly did not have a pistol, a gun and a sword. Upon being answered that he had a sword, but no gun or pistol, they ordered it to be delivered, which was done. The father and the wife of Stanly were in fear of them. They then asked for brandy, and being told that there was a little, kept for sickness, said "we want it"; and, out of fear, this also was delivered, whereupon all but one of the party drank of it twice, and then left. Upon Mrs. Stanly's seeming to be much alarmed, one of the party said, "do not be alarmed, you shall not be hurt."

Stanly testified that he was concealed in the woods that day out of fear of personal violence which had been threatened; also that in a conversation with the defendant during that term of the court, he confessed that he was one of those who took the sword, adding that he acted under the orders of J. W Meares. Witness also said that Meares had been a Captain in a company of Home Guards in the State service, but that his company had been disbanded, and he then had put himself at the head of a band of men who went about the country robbing and plundering.

"Upon this evidence it was insisted by the counsel for the defendant that only a case of forcible trespass was established, and the court was requested so to instruct the jury; but the court refused to give the instructions asked for, and, after defining the offences of robbery and larceny, to which no exception was taken, instructed the jury that they could not convict the defendant unless they were satisfied from the evidence, beyond a rational doubt, that the taking and carrying away was with a felonious intent. If they were so satisfied, they might convict; otherwise, they would acquit. The court explained that the taking and carrying away are felonious, where the goods are taken against the will of the owner, either in his absence, or in a clandestine manner, or where possession is obtained either by force, or surprise, or by any trick, device, or (153) fraudulent expedient, the owner not voluntarily parting with his entire interest in the goods, and where the taker intends in any such case fraudulently to deprive the owner of his entire interest in the property, against his will.

The counsel further requested the court to instruct the jury that, if they believed from the evidence that the defendant acted under the orders of Meares, believing that Meares had a lawful military command, they should acquit, whether Meares was authorized to give such orders or not. To this the court answered, there is no evidence that Meares had any military authority, or that the defendant acted under the belief that he had."

The defendant was convicted.

Rule for a new trial. Rule discharged. Judgment, and appeal.

Attorney-General, for the State.

No counsel for the defendant.

BATTLE, J. The prisoner was indicted at common law for an alleged act of robbery from the person.

This offence is denied to be "a felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence, and putting him in fear." 2 East. P. C., 707; Roscoe's Cr. Ev., 890.

It must be done *animo furandi*, with a felonious intent to appropriate the goods taken to the offender's own use. Roscoe's Cr. Ev., 895. Although a person may wrongfully take the goods, yet unless he intended to assume the property in them, and to convert them to his own use, it will amount to a trespass only, and not to a felony. 1 Hale's P. C., 890. As an illustration of this principle, Mr. Roscoe cites a case which occurred in Scotland. A scuffle took place on the
(154) high road between the prosecutor and the prisoner, in the course of which the former was deprived of his hat and a quantity of articles out of his pockets, which were afterwards found by the road side. But as it appeared that he was drunk at the time, and the articles might have been lost in the struggle, without any intent of felonious appropriation by the prisoner, the latter was acquitted. Roscoe's Cr. Ev., 896, citing Alison's Prin. Cr. Law of Scot., 358.

From these authorities it is apparent that the distinction between robbery and forcible trespass is, that in the former there is, and in the latter there is not, a felonious intention to take the goods and appropriate them to the offender's own use. This rule of law seems plain enough, but there is often a doubt about its application, arising from the difficulty of ascertaining the true intent of the offender at the time of the taking. Now this intent is a question of fact, and must be submitted to the jury with such instructions from the court as the circumstances of each case may require.

Upon the facts disclosed by the testimony in this case, the only ground which the counsel for the prisoner could take to show the want of a felonious intent was, that the prisoner was acting, or supposed that he was acting, under the orders of one J. W. Meares, who held, or was supposed to hold, a military commission of some sort in the State service. The transaction was alleged to have occurred in March, 1865, which was, as we know, before the termination of the late war. There was at that time, as we also know, a military organization in the State called the Home Guard. If the prisoner were acting in obedience to orders issued by the Captain of a company of that Guard, or *bona fide* thought that he was acting under such orders, and in obedience to them took the prosecutor's sword, not for the purpose of appropriating it to his own use, but solely with the view to disarm the prosecutor, he could not be held to have been guilty of robbery, no (155) matter how wrongfully he may have acted. Under such circumstances the *animus furandi* would be as much wanting as it was in Hall's case, 3 Car. & P., 409 (14 Eng. C. L. Rep., 337), which is thus stated by Mr. Roscoe: The prisoner had set wires in which game was caught. The game-keeper finding them, was carrying them away, when the prisoner stopped him, and desired him to give them up. The game-keeper refused, upon which the prisoner, lifting up a large stick, threatened to beat out his brains if he did not deliver them. The keeper, fearing violence, delivered them. Upon an indictment for robbery, Vaughan, Baron, said: "I shall leave it to the jury to say, whether the prisoner acted under an impression that the wires and the pheasant were his own property; for, however he might be liable to penalties for having them in his possession, yet if the jury think that he took them under a *bona fide* impression that he was only getting back the possession of his own property, there was no *animus furandi*, and the prosecution must fail" The prisoner was acquitted.

It was for the purpose of invoking the application of this principle that the prisoner's counsel asked for the last instruction set forth in the bill of exceptions, to-wit, that if the jury believes from the evidence that the prisoner acted under the orders of Meares, believing that he had a lawful military command, they should acquit, whether Meares was authorized to give such orders or not.

The Judge declined to give the instruction, saying, "there was no evidence that Meares had any military authority, or that the prisoner acted under the belief that he had such authority." In saying this we think his Honor erred.

In looking over the testimony we find it stated by the prosecutor that Meares had been a Captain in the Home Guard, but was not so at the time of the alleged robbery; that the company had been disbanded, and Meares had then put himself at the head of a band of men who went about the country plundering and (156) robbing. The same witness testified that the prisoner had freely and voluntarily made a confession to him, in which he had acknowledged that he was one of the party who took the sword, saying at the same time "that he acted under the orders of J. W. Meares." Here was, in our opinion, some evidence that Meares had a military command at the time of the alleged robbery, and that the prisoner was acting under his orders. The transaction took place in March, 1865, and the testimony was given in October, 1866; and after an interval of nineteen months, in the midst of the anxieties and distractions attendant upon the close of a great civil war, there was certainly ground for contending that the prosecutor was mistaken as to the time when Meares' company of Home Guards was disbanded. This view is sustained by the fact that the prisoner and his associates did not demand anything but the sword, pistol and gun of the prosecutor, and took only the sword after learning that the pistol and gun had been carried off, telling the wife of the prosecutor that she need not be frightened, as they did not intend to hurt her. We can not, and do not, pretend to say that the testimony was sufficient to produce an acquittal of the prisoner, but we think it was sufficient to justify the counsel in asking that it should be submitted to the jury for their consideration. Had it been properly left to them, and they had decided it adversely to the prisoner, he would have had no cause for complaint; but as it was withheld from them, there was an error committed, which entitles him to a *venire de novo.*

PEARSON, C. J. I fully concur in the opinion that the prisoner is entitled to a *venire de novo.*

His Honor erred in not explaining to the jury the difference between a forcible trespass and robbery, to which his attention was called by the prisoner's counsel. I believe the prisoner was convicted of robbery because the jury did not understand the difference (157) between the two offences. Forcible trespass is the taking by force the personal property of another. Robbery is the fraudulent taking by force the personal property of another.

There can be no doubt as to the force, for, although the prisoner told the good woman that she need not be alarmed, still there was the show of force, the multitude of men with arms; and we learn from Foster that the party need not be "put in fear." If one takes the personal property of another, with intent to appropriate it to his own use, slyly, with stealth, showing an intention not to let the owner know that it is taken or who took it, he steals; if he takes it forcibly, with an intent to appropriate it to his own use, but does it openly and above-board, he commits a forcible trespass; but if, besides this, the taking is done in such a manner as to show an intent to defraud the owner, by concealing from him who took it, so that he shall not know what has become of his property, and against whom to bring his action to recover it, or damages for the taking, and an intent to elude public justice. This constitutes the *animus furandi*, and it is robbery. These are plain distinctions to be deduced from the books. See Foster's C. L., 123, 128, 129, A.

In this case there is no evidence that the prisoner endeavored to conceal from the owner what had become of his sword, or who had taken it; so he knew against whom to bring his action and to direct the arm of public justice. If the party had gone there disguised, for instance blacked like negroes or having masks on, that would have been pregnant proof of an intent to defraud; or if they had demanded and taken money, or clothes, or jewelry, or articles of like kind, that would have tended to give complexion to the act; but they merely, in the daytime, demanded the gun, pistol and sword, and took the sword and went off with it, and have staid in the same neighborhood until this time, it shows that their purpose was simply to disarm one whom (158) they thought might be dangerous to their cause if allowed to keep arms. So it seems to me there was no ingredient of robbery except the force; in other words, there was no fraudulent felonious taking, with an intent to appropriate "*causa lucri,*" no *animus furandi*, and the prisoner was entitled to full instructions upon the law; more especially, as in these evil times the distinction between these offences has been very generally confounded in the newspapers, and in ordinary parlance.

The fact of demanding liquor and taking a drink does not in my opinion affect the case much in one way or the other, and only tends to show the careless state of the country.

PER CURIAM. *Venire de novo.*

Cited: State v. *Deal*, 64 N. C., 272; *State* v. *Barefoot*, 89 N. C., 567; *State* v. *Powell*, 103 N. C., 427; *State* v. *Grigg*, 104 N. C., 882; *State* v. *Coy*, 119 N. C., 903.

WILLIAM H. HALL v. CHARLES E. THORBURN.

1. Where the affidavit and process in a case of original attachment described a defendant as "C. E. Thorburn," his name in full being "Charles E. Thorburn:" *Held*, that the court below might, at any time before final judgment, allow the plaintiff to amend the proceedings by substituting the latter name for the former.
2. The note upon which the suit had been brought being signed "C. E. Thorburn," *quære* whether the amendment was necessary.

(*Lane v. R. R. Company*, 50 N. C., 26; *State Bank v. Hinton*, 12 N. C., 297, cited and approved.)

AMENDMENT of an original attachment, allowed before his Honor, *Merrimon, J.*, at Fall Term, 1866, of the Superior Court of New Hanover.

The note, which was the foundation of the attachment, was signed by one "C. E. Thorburn," and the description of the defendant in the affidavit and process was the same. At Fall Term, 1866 (the second (159) term), the counsel for the plaintiff moved to amend the proceedings by substituting for the above name that of "Charles E. Thorburn," which the defendant objected to, and offered to file a plea in abatement for misnomer.

The court having allowed the amendment, the defendant appealed.

Strange, for the plaintiff.
W. A. Wright, for the defendant.

The affidavit in the case was framed in violation of that rule of pleading which prescribes that pleadings must specify and set forth accurately the Christian name and the surname of both parties. Com. Dig. Abatement E., 18, E. 19; Stephen Pl., 302. Charles Edward Thorburn, who owns the property that was attached here, has a right, upon replevying, to object to the process by which his property was brought into court. A writ served on "John" by the name of

"James" is not cured by declaring against the party by his true name, and the court will set it aside. *Doe* v. *Butcher*, 3 T. R., 611; *Greenlee* v. *Rothesay*, 2 New. Rep., 132.

The court had no power to substitute a new affidavit, or to amend one already made. If there be no affidavit made, or none that sets forth the facts necessary to the jurisdiction of the court, the proceedings are *coram non judice.* The court can not confer jurisdiction upon itself by amendment; for necessarily jurisdiction must precede amendment. Our statute upon attachment makes no provision for amendment of affidavits in such cases, although this is done in other States. Here the affidavit is a condition precedent. *State Bank* v. *Hinton*, 12 N. C., 485. An amendment would be to evade the statute, which no court can do. *Phillipse* v. *Higdon*, 44 N. C., 391. The distinction between the principle of the amendment in *State Bank* v. *Hinton*, and that of the one asked for here, is vital.

(160) BATTLE, J. The first section of the third chapter of the Rev. Code enacts that "the court, in which any action shall be pending, shall have power to amend any process, pleading or proceeding in such action, either in form or substance, for the furtherance of justice, on such terms as shall be just, at any time before judgment rendered thereon." The liberality with which the courts have allowed amendments under this provision is well known, and has been universally approved. It has been forcibly said, "that under it anything may be amended at any time." In the case of *Lane* v. *Railroad*, 50 N. C., 26, it was held that where a person was arrested under a wrong name, the plaintiff might amend the process by inserting the right one. If that be so, surely an amendment ought to be allowed, whether the defendant has been proceeded against in a name which he used in making the very contract which was the ground of the suit, though it was not his name in full. Nor can it make any difference that the proceeding is by attachment instead of a regular suit. In the case of the *State Bank* v. *Hinton*, 12 N. C., 397,

after the defendant had filed a plea in abatement, that the plaintiff had failed to give bond and make affidavit, and have them returned to court, to which the plaintiff demurred, he was permitted to withdraw his demurrer, and file, *nunc pro tunc*, a bond and affidavit which had been respectively given and made, and which the justice of the peace had failed to return. In this way the fatal defect of the non return of the bond and affidavit was remedied, to the manifest furtherance of the justice of the case. In like manner the error (if error it were) of suing the defendant Thorburn in the name of C E. Thorburn instead of Charles E. Thorburn, was properly permitted to be cured in the court below by the amendment which was there allowed.

The decision of the question of amendment in favor of the plaintiff precludes the necessity of saying (161) anything about the plea in the abatement for misnomer, which the defendant proposed to file. The interlocutory order made in the Superior Court is affirmed.

PER CURIAM. Order affirmed.

THE STATE v. JOHN FARROW.

A took a bucket of peas to market, and, having occasion to go some distance to enquire the price of peas, set the bucket down in a cart, which he mistook for that of a friend; the owner of the cart returning to it, placed the bucket upon the ground, and afterwards being about to leave the market, raised it up and asked: "Whose are they?" Whereupon B, a retailer of vegetables, came up and placed his hand upon the bucket, and then took it, the owner of the cart yielding it, and saying: "You must give it up to the owner when he comes and calls for it;" afterwards A found B with the bucket, beets and lettuce having been placed upon the peas, and B manifested insolence and unwillingness to surrender it: *Held*, that there was evidence from which a jury might infer every ingredient of larceny.

(*The State v. Roper*, 14 N. C., 473, cited, distinguished and approved.)

LARCENY, tried before his Honor, *Merrimon, J.*, at Fall Term, 1866, of the Superior Court of New Hanover.

The facts were that one Tony Quince took a bucket of peas to market in Wilmington, and set it down in a cart, mistaking the cart for that of a friend. He then left it and went some distance to inquire about the price of peas in the market. Returning, he passed the defendant with a bucket of peas in his hand which he thought was his own, but said nothing. Finding his bucket gone, he retraced his steps and found the defendant in possession of it, with beets and lettuce upon it, and took it from the defendant, who was insolent and unwilling to surrender it.

(162) The owner of the cart (introduced by the defendant) showed that upon finding the bucket in his cart, being about to move the latter, he placed the bucket upon the ground, and shortly thereafter, as he was leaving the market, he raised the bucket and inquired of the by-standers, " Whose are they"? adding that they did not belong to him; thereupon the defendant came up, put his hand upon the bucket and took it from the witness, who told him, "You must give it up to the owner when he comes and calls for it."

The court below charged the jury that if the facts were as stated Tony had not abandoned the bucket of peas; that the bucket was in his constructive possession; and that if the defendant, in taking it had a felonious intent to steal it, he was guilty.

Verdict, "Guilty." Rule for a new trial. Rule discharged. Judgment, and appeal.

Attorney-General, for the State.
W. A. Wright, for the defendant.

A trespass is a necessary ingredient in every larceny. 2 East P. C., 554; 1 Hawk. P. C , 33, sec. 1; 1 Russ., 95; *State* v. *England*, 53 N. C., 399.

The bucket, when taken by the defendant, was not in the actual or in the constructive possession of Tony. The owner of the cart could have maintained trespass for it. 2 Saund. R., 47e; *Blackman's case*, 1 Salk., 290. He had assumed exclusive dominion and control over it, and directed what should be done with it, having himself obtained possession *bona fide*. If the owner of the cart had stolen the peas, the defendant could not be found guilty under this charge, because the taking possession from Tony was an act completed before defendant had any part in the transaction. *King's case*, Russ. & Ry. Cr. Cas., 332.

The bucket being lost, and the owner unknown, (163) it was not the subject of larceny. 3 Inst., 108; 1 Hawk. P. C., chap. 3, sec. 32; 1 Hale, 506; *Tyler* v. *People*, 6 Breese, 227; *State* v. *Roper*, 14 N. C., 473. The bucket was lost, for the owner had put it in a different place from that in which he had supposed. The defendant received it openly, and with a trust in behalf of the owner, publicly accepted, which renders the case one in which a felonious intent could not be ascribed. See Wharton Cr. L. (3d ed.), 653, note 2.

PEARSON, C. J. There was evidence from which the jury were at liberty to infer and find every ingredient of larceny. Tony Quince had no notion of abandoning his bucket of peas. He knew the precise place where he put it and had *animum revertendi;* so it was no more "lost" than a gentleman's hat left in the passage upon his entering the parlor, and the fact that he put it on a chair instead of a table is immaterial. So "*Roper's case*" (14 N. C., 473), can not be made to fit.

This is no error. This will be certified to the end, etc.

PER CURIAM. There is no error.

(164)

J. D. GRISSETT v. ALVA SMITH.

1. The proceedings for forcible entry and detainer are intended to be summary, and therefore no appeal is given.
2. Any one aggrieved thereby may have remedy by the writ of *recordari*, by which the defendant may show that the justice was guilty of misconduct or irregularity, or may have the benefits of a writ of false judgment.
3. Where the verdict in such proceedings, in respect to the estate of the plaintiff, was, "And we, the jurors, do hereby decide that the said A. S., plaintiff and owner of said house, etc., do give him full possession of the same:" *Held*, that such description was insufficient.

(*Sherrill v. Nations*, 23 N. C., 330; *Mitchell v. Fleming*, 25 N. C., 123; *State v. Anders*, 30 N. C., 15, and *Watson v. Trustees, etc.*, 47 N. C.. 211, cited and approved.)

FORCIBLE ENTRY AND DETAINER, brought up by writ of *recordari* before *Gilliam, J.*, at Fall Term, 1866, of the Superior Court of Columbus, and then by him quashed.

Upon the return of the proceedings the petitioner assigned several errors therein. Among these it is only necessary to mention one, viz: "Because the jury did not find that the plaintiff had either 'a freehold or a term for years,' or any other present estate in the premises in dispute."

The opinion of the court contains the only facts that are necessary to its being understood.

Person, for the petitioner.
Moore, for the defendant.

BATTLE, J. The proceedings under the statute of forcible entry and detainer before a justice out of court are and were intended to be summary and expeditious. It would have been destructive of the object intended by them had an appeal been allowed, and hence none is given. See Rev. Code, chap. 49; Rev. Stat., chap. 49. It is a mistake to suppose that the provision in the Rev. Code, chap. 62, sec. 23, which gives the right of (165) appeal to any party dissatisfied with the judgment of a justice of the peace, was intended to apply to a case like this. That provision is contained in the chapter of the Revised Code concerning "Justices of the Peace," and is fully satisfied by applying it to the ordinary subjects of jurisdiction confided to justices acting out of court. The Revised Statutes, chap. 62, contains a similar provision in section 22, and yet it was said by this court, in a case which occurred subsequently to the time when they went into operation, that no appeal was given by the statute. *Sherrill* v. *Nations*, 23 N. C., 330. But notwithstanding that no appeal is given, a defendant who feels himself aggrieved by the proceedings against him has a full and complete remedy by means of the writ of *recordari*, which is the actual and perhaps the only remedy to which he can resort. See all the cases in this State collected in Battle's Digest, 613, 614.

Under this writ the inquisition and proceedings connected therewith are taken to the Superior Court, where the defendant may, if he can, show that the justice was guilty of misconduct, or irregularity in receiving improper testimony, or refusing to receive proper testimony, or otherwise. He may also assign errors apparent upon the record of proceedings as in the case of a writ of false judgment. See *Sherrill* v. *Nations*, cited above, and the authorities therein referred to.

In the case now before us the defendant has availed himself of this right, and has assigned several errors as appearing upon the inquisition, of which it is necessary for us to notice only one. It is that the jury have not found by this verdict that the plaintiff had any present estate in the land, either "of freehold or for a term of years." That such a finding is essential is clearly shown by the cases of *Sherrill* v. *Nations*, *ubi supra; Mitchell* v. *Fleming*, 25 N. C., 123; *State* v. *Anders*, 30 N. C., 15; *Watson* v. *Trustees of Floral College*, 47 N. C., 211.

The verdict of the jury to which this exception is taken is as follows: "That we find said Judson (166) D. Grissett holding said hotel as charged in the warrant, and that we, the jurors, do hereby decide that the said Alva Smith, plaintiff and owner of said house, etc., do give him full possession of the same." It is difficult to discover any sensible meaning in the latter part of this verdict, and it is utterly impossible to deduce from it a finding that the plaintiff had any present estate of freehold or term for years from which he had been unlawfully and forcibly dispossessed or kept out, and to which he had a right to be restored. Whether he was owner of either of those kinds of estates, or was owner as a tenant at will, or in remainder or reversion, is left undetermined. It was the more necessary in this case for the jury to be precise in ascertaining the kind of estate of which the plaintiff claimed to be seized or possessed, because the defendant, in his traverse of the force charged against him, alleged that he was in possession under a lease for a year and retained possession peaceably under that lease, that allegation not being traversed by the plaintiff; and the failure in the inquisition to find such a present estate in the plaintiff as the law requires was fatal to the whole proceedings, and justified the Superior Court in quashing them and ordering a writ of re-restitution; and the judgment must therefore be affirmed with costs.

PER CURIAM. Judgment affirmed.

Cited: Murrill v. *Murrill*, 90 N. C., 120.

(167)

WM. GRIFFIN and another v. JOSEPHINE GRIFFIN and others.

1. No appeal lies from a judgment given upon an inquisition before a justice of the peace, for forcible entry and detainer.
2. A defendant has no right to claim that a Judge shall suspend action upon a motion that has been made to dismiss such an appeal, in order to allow him to file a petition and affidavit for writs of *certiorari, mandamus* and *supersedeas*.

(*The State v. Nations*, 23 N. C., 325, cited and approved.)

FORCIBLE ENTRY AND DETAINER, before his Honor, *Gilliam, J.*, at Fall Term, 1866, of the Superior Court of Robeson.

The justice of the peace, before whom the proceedings had been, allowed the defendants to appeal to the Superior Court. On motion in that court to dismiss the appeal, the defendant proposed, on the contrary, to make an affidavit for writs of *certiorari*, *mandamus* and *supersedeas*. His Honor refused to hear this latter application at that time, but ordered the appeal to be dismissed, and that a *procedendo* issue.

From this order the defendant appealed.

Person, for the plaintiffs.
Leitch, for the defendants.

PEARSON, C. J. The power given to justices of the peace to make inquisition of forcible entry and detainer is summary, and it was intended that justice should be done in an expeditious manner. There is no appeal given by the statute. *State* v. *Nations*, 23 N. C., 325.

Indeed, if defendants were at liberty to appeal, the purpose of the statute to give a summary remedy would in all cases be evaded. So there is no error in the order dismissing the appeal and awarding a *procedendo*.

The other ground of complaint set out in the record that his Honor refused to suspend action on the (168) motion to dismiss the appeal and allow the defendants to file a petition and affidavit for writs of *certiorari*, *mandamus* and *supersedeas*, is not tenable. The petition and affidavit could have been presented to his Honor at chancery as well after the appeal was dismissed as before, and it was a matter of discretion at what time his Honor would be pleased to hear the application.

There is no error.

PER CURIAM. Judgment affirmed.

JAMES P. LEAK v. JOHN T. MOORMAN.

1. The statute upon attachment must be construed strictly.
2. A plea in abatement is the proper mode of taking advantage of a defect in the affidavit for an attachment.
3. The creditor's affidavit under c. 7, s. 1, Rev. Code, must state that the removal or the absence from the county or State, or the concealment, on the part of the debtor, was for the purpose of avoiding service of ordinary process.

(*State Bank v. Hinton*, 12 N. C., 397; *Gorman v. Barringer*, 19 N. C., 502; *Evans v. Andrews*, 52 N. C., 117, and *Cherry v. Nelson*, *Id.*, 141, cited and approved.)

ORIGINAL ATTACHMENT, tried before *Gilliam, J.*, at Fall Term, 1866, of the Superior Court of Richmond.

The attachment was issued April 16, 1866, by a justice of the peace, returnable to the Fall Term of the Superior Court. The affidavit made by the plaintiff stated "that he (the plaintiff) hath good reason to believe that the said Moorman hath removed himself out of the county, or is absent from the county or State, so that the ordinary process of law can not be served on him." Bond was given in double the amount of the debt, was in the usual form and conditioned for the payment to the defendant of all damages he (169) might incur from a wrongful suing out of the attachment.

The sheriff levied the attachment upon the defendant's land. Upon its return to court the defendant appeared, filed a bail bond and pleaded in abatement to the affidavit and bond of the complainant, that the justice did not take and return such affidavit and bond as entitled the complainant to an attachment, and that the complainant did not make such affidavit or give such bond, etc.

Upon joinder of issue the plea was sustained and his Honor ordered the proceedings to be quashed.

Plaintiff appealed.

Phillips & Battle, for the complainant.
Leitch, for the defendant.

BATTLE, J. In *The State Bank* v. *Hinton*, 12 N. C., 397, it was said by the court, in speaking of the attachment law, that "there is no law in the statute book which more imperiously demands a strict construction; for the property of an absentee may be all sold upon an attachment wrongfully sued out, before he is apprised of the proceeding, and, if he then should discover that no bond and affidavit were taken and returned, his remedy must at best be very imperfect."

The plea in abatement, filed by the defendant in the present case, does not aver that no bond and affidavit had been taken and returned to court, as required by the Rev. Code, chap. 7, sec. 3; but that no such bond and affidavit had been taken and returned as entitled the plaintiff to sue out an attachment against the defendant. The defect is alleged to be in the affidavit; and it must be inferred from what was said by the court in *Gorman* v. *Barringer*, 19 N. C., 502; *Evans* v. *Andrews*, 52 N. C., 117; *Cherry* v. *Nelson*, *Ibid.*, 141, that a plea in abatement is the proper mode for taking advantage of it. It is manifest that the same (170) policy which requires a strict construction of the statute in relation to the taking and return of the affidavit and bond must likewise require that such affidavit and bond shall be sufficient in law to authorize the extraordinary remedy of attachment.

The alleged defects in the affidavit are: first, that the plaintiff does not swear positively that the defendant had removed himself out of the county, or was absent from the county and State, so that the ordinary process of law could not be served upon him; and, secondly, that such removal or absence is not stated in the terms required by the statute. As to the sufficiency of the first objection it is unnecessary for us to decide, because we think that the second is certainly fatal to proceeding. The first section of the act requires that a person, who proposes to take out an attachment against the property of a debtor, shall swear to either one of three things, to-wit: that he hath removed or is privately removing himself out of the county; or absents himself from the county or State; or conceals himself, so that the ordinary process of law can not be served on him.

Here it is manifest that the removal from the county, or the absence from the county or State, or the concealment, must be an act of the party done for the purpose of avoiding the service of the ordinary process of the law; and that fact must be sworn to by the plaintiff.

If he swear to two or more of these acts in the alternative, each must be substantially in the terms required by the statute; otherwise he might obtain an attachment upon a ground which the law has not sanctioned. Of this the present case furnishes a striking instance. The affidavit is that the defendant "hath removed himself out of the county, or is absent from the county and State, so that the ordinary process of law can not be served upon him." Here it is apparent that neither of the alternative acts meet, either literally or substantially, the requirement of the statute. A mere removal from the county, without its being done privately, (171) is not a sufficent cause for an attachment; nor is a mere absence from the county and State, without any design of evading process. And yet the terms used, upon which the attachment was issued, do not imply either a wrongful removal or absence. This defect can not be aided by the inference, "so that the ordinary process of law can not be served on him." That inference must follow legitimately from the facts stated, and can not supply the omission of the statement of the facts themselves.

It is obvious, therefore, that the affidavit is fatally defective, and the plea in abatement was on that account properly sustained.

PER CURIAM. Judgment affirmed.

Cited: Askew v. *Stevenson, post*, 289.

CALVIN H. WILEY v. JONATHAN WORTH and others.

Public officers who have not taken the required oaths of office are not entitled to the salaries attached to such offices.

MANDAMUS, heard before *Barnes, J.*, at December Special Term, 1866, of Wake Superior Court.

The petition, filed at Fall Term, 1866, stated that the petitioner, by various biennial elections, had been Superintendent of Common Schools in North Carolina from January 1, 1853, until March 7, 1866, at which latter date the office was abolished; that as such he was entitled to a salary which has been paid up to January 1, 1865, but not since; that the last election in which he had been chosen by the General Assembly occurred in the latter part of 1864; that during 1865, and up to March 7, 1866, he had discharged the duties of (172) his office so far as the military orders of the United States would allow; that "he had never been required to take an oath, and never did take an oath to support the Confederate Constitution or Government," and so was advised that the ordinance of the 19th of October, 1865, did not affect the tenure of his office; that he was entitled to his salary for four months, from January 1, 1865, to May 1, 1865, and again from November 27, 1865, to March 7, 1866—in all $916 66; that he had applied to Governor Worth as *ex officio* President, and to the other defendants as members of the Board of Literature, to order such salary to be paid to him, and that they had refused. Thereupon he prayed for a *mandamus, etc.*

The answer admitted that the petitioner had been Superintendent, etc., as he claimed to have been, and that he had acted as such until the time, viz. about May 1, 1865, when the military authorities of the United States occupied the State and removed its public officers; it alleged that thereupon a Provisional Government had been set up in North Carolina, and that this continued until January, 1866, when the defendant, Jonathan Worth, was installed as Governor; it did not admit that the petitioner had done any service as Superintendent, etc., since January 1, 1865; it alleged that the salary during that time, if due, was expressly payable in Confederate money, etc.; also, that the petitioner during that time was in office by the choice of persons who were rebels to the Government of the United States, and that there was then no State Government in North Carolina in regular and constitutional relation to the United States, and therefore that he is not entitled to a salary from the present Government

The preliminary proceedings for an alterative *mandamus* having been waived, it was adjudged in the court below that the petitioner was not entitled to any salary during the year 1865, but that he was entitled to (173) $391.66 for his salary from the 1st day of January to the 7th of March, 1866, and for that sum a *mandamus* was ordered to issue.

From this order the defendants appealed.

Bragg and *Mason*, for the petitioner.
Rogers & Batchelor, for the defendants.

PEARSON, C. J. This court is of opinion that the petitioner is not entitled to demand any part of the amount claimed by him as his salary. He rests his claim on the allegation that "he had never been required to take an oath, and never did take an oath, to support the Confederate Constitution or Government."

In our view of the subject, if he had taken the oath to support the Constitution of the Confederate States, he would have had a stronger ground of claim than that which he now occupies; for it is enacted (Acts of 1861, chap. 25), "All Judges of the Superior and Supreme Courts, and all Justices of the Peace, and all other persons holding any office in this State, and required to take an oath of office before proceeding to discharge the duties of such office, shall be required, before proceeding further in the discharge of the duties of office, to take an oath to support the Constitution of the Confederate States of America." Here there is a public

statute of which all persons are bound to take notice. There can be no doubt that this statute embraces the office held by the petitioner; it was one of "profit and trust," and one the incumbent of which was, by law, required to take an oath of office. Had Mr. Wiley taken the oath and discharged the duties of his office in reference to the *de facto* Government of the State, as those duties concern matters purely civil, and were in no point of view connected with the war, it would have presented a strong case under the doctrine of "*quantum meruit*"; for, in point of fact, the rightful Gov-
(174) ernment of the State, although suspended by force and usurpation, did receive benefit from the labor of the civil officers of the wrongful government. For instance, a Judge takes the oath to support the Constitution of the Confederate States and rides the circuits, administering the law and keeping everything quiet, the war to the contrary notwithstanding. The people in Convention assembled ratify and declare valid all judicial acts done during the war, without intimating an opinion, it would seem, as the rightful State Government takes the benefit of his labor, that he is entitled, *ex bono et æquo*, to be paid for his services?

But Mr Wiley stands in a different attitude. He declined to take the oath of allegiance to the wrongful *de facto* government, and of course could not serve it; and, as a further matter of course, he could not serve the rightful State Government, which was then suspended, being evicted from the exercise of its functions by war and usurpation. So Mr. Wiley can claim nothing of either government, for he did not render the required service to either.

Again, Mr. Wiley was elected by the Legislature of the wrongful government in 1864, for a term of two years, to begin July, 1865, but he was never inducted into the office, for, as he avers, he did not take the oath of office required by law. Then followed the surrender, and, as is said in *Hughes' case*, *ante*, 68, the political death of all of the officers of the State, to all intents and purposes, as if they had died a natural death. To this may be superadded that an ordinance of the Convention of 1865 declared all offices vacant and required new elections.

The petitioner was not re-elected, but claims a right to fill the office up to March, 1866, when the office was abolished, on the ground of his election in 1864 by the Legislature of a wrongful government, to which he had never given his allegiance! And yet he now wishes to rely upon the action of that wrongful government as the ground of his claim to the office and (175) the emoluments thereof.

PER CURIAM. Judgment below reversed. Judgment here that defendants go without day and recover their costs.

Cited: *Cooke* v. *Cooke*, *post*, 587; *State* v. *Cansler*, 75 N. C., 444; *Hayley* v. *Hayley*, 62 N. C., 185.

ABEL GRIFFIS v. A. S. MCNEILL, and another, Adm'rs, etc.

1. A writ of *scire facias* upon a judgment in a County Court, notwithstanding the Stay Law of September, 1861, will not lie, except to the court in which the judgment is.
2. Where a writ of *scire facias* upon a judgment in a County Court had been brought to a Superior Court: *Held*, that, notwithstanding the Stay Law of the Convention of 1866, it would be dismissed at the costs of the plaintiff.

SCIRE FACIAS, before his Honor, *Fowle, J.*, at Fall Term, 1866, of the Superior Court of Alamance.

The writ had been sued out of the Superior Court, returnable to Spring Term, 1864, and recited a judgment in the County Court of Alamance. At Fall Term, 1866, the plaintiff moved to dismiss the writ at the costs of the defendant, but his Honor ordered it to be dismissed at the costs of the plaintiff, and from this judgment the latter appealed.

Graham, for the plaintiff.
Ruffin, for the defendant.

PEARSON, C. J. By 13 Edw. I, chap. 45, re-enacted Rev. Code, chap. 31, sec. 109, it is provided: "No execution shall issue upon any judgment obtained in said courts after a year and a day from the rendition thereof, and when the party shall come after the year and a day he shall cause a *scire facias* to be issued to give (176) notice to the defendant, 'that he appear before the court in which the judgment is at a certain day,'" etc.

So it is entirely clear that a *scire facias* can not issue from the Superior Court upon a judgment in the County Court.

But it is said the Act of 1861 suspends all proceedings in the County Courts in regard to matters of debts and contracts, and directs writs and other process to be made returnable to the Superior Courts; and it is insisted that this extends to writs of *scire facias*. Such does not seem to us to be the proper construction.

The plaintiff could have brought an action of debt in the Superior Court upon the judgment in the County Court; so he had the remedy contemplated by the statute, and there are no words used to show an intention to give him the additional remedy by *sci. fa.*, which is a peculiar one and is confined by the express words of the statute giving it "to the court in which the judgment is."

It was then insisted by Mr. Graham that under the ordinance of 1865, the *sci. fa.* ought to have been dismissed at the cost of the defendant.

The ordinance obviously has reference to writs of *sci. fa.* properly constituted in courts, and it would be a perversion of its purpose and design to give to it the effect of preventing a defendant from availing himself of a fatal objection or motion to dismiss, which of course would be at the costs of the plaintiff.

It was only in the event that the defendant could not otherwise get rid of the *sci. fa.* that the ordinance confers upon him the privilege of having it dismissed, provided he will pay the cost. Here the defendant did not choose to resort to the ordinance, as there was, upon the face of the *sci. fa.* a fatal objection.

PER CURIAM. Judgment affirmed.

(177)

THE STATE to the use of JOHN U. KIRKLAND v. ELLISON G. MANGUM.

Previously to the act of 1866, in relation to evidence, the relator, in an action brought in the name of the State, was not competent as a witness.

SCIRE FACIAS, to revive a judgment obtained upon an award made in the course of a suit brought upon a constable's bond. Upon the trial before his Honor, *French*, *J*, at Fall Term, 1864, of the Superior Court of Orange, as is stated in the case sent up, "the counsel for the defendant submitted various objections to the judgment, and to the *scire facias* as varying therefrom. These having been overruled, they offered the relator as a witness, to show that the judgment had been satisfied as to him. This was done as a foundation for offering a paper in the handwriting of the person alleged to be substantially the relator, going to show that the judgment, in great measure, had been satisfied as to him. The witness was held to be incompetent."

Verdict for the plaintiff. Rule for a new trial. Rule discharged, and appeal to the Supreme Court.

Graham, for the plaintiff.
No counsel for the defendant.

READE, J. The only question which seems to be presented in the case is, whether the defendant had the right to compel the relator to testify as a witness?

The relator is substantially the plaintiff, and we are not aware of any case in which it was held that he was compelled to testify, and it is certainly against general principles. There is a recent statute making parties competent witnesses; but it was passed since the trial of this case, and of course did not apply.

(178) If any other points were intended to be presented, they were not made at the bar, and are so obscurely stated that they are not considered.

PER CURIAM. Judgment affirmed.

W. N. SHELTON v. LAZARUS FELS.

1. The right to have an execution set aside, which had been issued before the date to which it had been postponed by an order of record, is personal to the defendant therein: Therefore,
2. Where, upon the confession of a judgment at June Term, 1866, an entry was made, "Execution stayed by order of plaintiff until after April Term, 1867," and, upon the defendant's conveying his property in trust, the plaintiff ordered execution to issue before such term: *Held*, that the court would not set aside such execution, at the instance of the trustee.

MOTION to set aside an execution, which, by successive appeals, had come up from an order by the County Court of Caswell

At July Term, 1866, of that court, Abisha Slade confessed judgment in an action of debt to Lazarus Fels, and at the same term the following entry was made on the record: "Execution stayed by order of plaintiff until after April Term, 1867." Before the next term of the court Slade conveyed all his estate to W. N. Shelton, in trust for certain of his creditors, and thereupon Fels ordered execution to issue, and this was levied on Slade's lands. At October Term Shelton moved to set the execution aside as having been issued in contravention of the above entry. Slade refused to let his name be used for such motion, and the court disallowed it.

Upon the motion being renewed in the Superior Court

(179) at Fall Term, 1866, before his Honor, *Fowle, J.*, it was again disallowed, and the trustee appealed to this court.

Ruffin, Phillips & Battle, for the trustee.

The reason of the cases in which it has been held that the defendant in the execution may move to set aside such process applies here in behalf of the trustee, as the defendant has stripped himself since the judgment of all property that might have been affected thereby, and such property has come to the trustee. Compare the cases—*Wood* v. *Bagley*, 34 N. C., 83; *Murphy* v. *Wood*, 47 N. C., 63, and *Cody* v. *Quinn*, 28 N. C., 191.

No counsel for defendant.

READE, J. The entry upon the docket by the plaintiff, in the suit of *Fels* v. *Slade* (the same in which this motion is made), of a *cesset executio*, until April Term, 1867, did not annul or suspend the judgment so as to avoid a *fieri facias* issued on it. *Cody* v. *Quinn*, 28 N. C., 191. But still it was so far binding between the parties that the court would compel them to observe it. And the plaintiff Fels having had a *fieri facias* issued upon it before the expiration of the time, it would have been proper for the court, upon the motion of Slade, the defendant in that suit, to set aside the execution.

Observe, we say, upon the motion of Slade; for, very clearly, no one except him could maintain the motion.

And so far from this being Slade's motion, he appeared in court and protested against the motion of Shelton. Slade had the right either to insist upon or to waive the *cesset executio*, and he did the latter.

PER CURIAM. There is no error.

Cited: *Jacobs* v. *Burgwyn*, 63 N. C., 197; *Knott* v. *Taylor*, 99 N. C., 515.

(180)

JOHN BEARD v. NICEY HUDSON.

1. A County Court, upon application by the master to whom it has bound an apprentice, has power, and in a fit case it is its duty, to restore to his possession such apprentice, if at the time of application a runaway.
2. Discussion and statement of the relation between the court upon one hand, and the master and the apprentice upon the other.

MOTION, heard before *Buxton, J.*, at Fall Term, 1866, of the Superior Court of Rowan, upon an appeal from a decision on the same in the County Court of that county.

In the County Court, at November Term, 1866, it was shown that notice of the proceedings had been served upon the defendant, as mother of the apprentice, and the person in whose custody he then was; and upon such notice a motion was made that the sheriff commit the apprentice to the custody of the master. The apprentice was shown to have been bound to the master by the same court at February, 1859; in May, 1865, he had run away, and was then living in an idle and disreputable manner with his mother.

The court declined to grant the motion, upon the ground that it had no power so to do.

In the Superior Court, after argument, the decision below was affirmed, and the master appealed to this court.

Blackmer & McCorkle, for the plaintiff.

1. The County Court has power to bring its apprentices before it, whenever either the good of the apprentice, the good of the master, or that of the community, demands it. It has the power and is subject in general to the duties of a guardian over this class. See *Prue* v. *Hight*, 51 N. C., 265.

2. The English decisions are against the right of a master to make use of a *habeas corpus* in such a case. *Rex* v. *Reynolds*, 6 T. R., 497; *Rex* v. *Edwards*, 7 T. R., 745.

(181) *Boyden & Bailey*, for the defendant.

1. An analysis of the statutes upon the subject of apprenticing shows that this claim of power does not exist.
2. A *habeas corpus* does not lie in England at the instance of the master, because a statute of Henry VIII, that has not been re-enacted here, gives to the Chief Justice a summary jurisdiction over the apprentice.
3. The master can seize the apprentice of himself. 1 Chitty Pr., 70–71, 690; Kent., 2d, 212.
4. In *Prue* v. *Hight*, 51 N. C., 265, the master was acted upon by the order, and that is according to the principle there stated. It does not apply here.

READE, J. Our apprentice law makes it the duty of the County Court, in binding out apprentices, to enter into indentures with the master "in the name of the Chairman of the County Court of the one part, and of the master of the other part." Rev. Code, chap. 5, sec. 4.

The statute prescribes the rights and the duties of the master and of the apprentice, and the powers and duties of the court. It makes it the duty of the master to provide for the apprentice "diet, clothes, lodging and accommodation, fit and necessary," and also for his education. And it makes it the duty of the apprentice to serve his master. Besides, it makes it the duty of the court to exercise general superintending powers over both master and apprentice, in all matters pertaining to that particular relation. It is proper that the indentures should, substantially, embrace all these duties and obligations. We suppose the indentures in this case do embrace them, as it is stated that the apprentice was regularly bound.

Thus it will be seen that the contract of binding, the indentures, is not between the master and the apprentice, but between the master and the court. And if, at any time during the apprenticeship, the master (182) neglect his duty to the apprentice, the court has the power to require the master and the apprentice to appear before the court, and to remove the apprentice and bind him to another. And so, if the apprentice misbehaves, the court may interfere at the instance of the master. It can not be doubted that just as the obligations of master and apprentice are mutual, and as the court has the supervision of the relations between them, so it is within the power and it is the duty of the court to interfere at the instance of either against the other, whenever a proper case is presented. The master contracts with the court, in the indentures, that he will perform his duties as master, and the court will at all times see that he does so. And, in consideration thereof, the court contracts with the master that the apprentice shall serve him faithfully And while the court compels the master to a strict compliance with his part of the contract, it would be bad faith if the court should fail to comply with its part of the contract, *i. e.*, that the apprentice should serve the master. The power of the court over orphans does not cease when they are bound out. It is a continuing power, and the indentures with the master are continuing obligations. While the ordinary relations of master and apprentice exist, the court ought not to interfere. It is then a domestic relation, subject to ordinary domestic regulations; but when the relation is wantonly broken, or grossly abused, it becomes the duty of the court to interfere.

In this case the apprentice had wantonly left the master's service, and was living in "an idle and disreputable manner."

If he had never been bound out before it would have been the duty of the court to have him then bound out and delivered to a master. As he had been already bound and had left service, in disobedience to the order of the court and in violation of its undertaking (183) in his behalf, it could not be less the duty of the court to have him brought and delivered to the master anew.

It is true that the master had the power to seize the apprentice, wherever he might find him, and compel his service.

And when he applied to the court for its aid, the court might, in the exercise of a sound discretion, have left the master to the exercise of his own powers. And if the County Court had put its refusal to interfere upon that ground, *i. e.*, the want of a proper case for interference, this court would not have reviewed the exercise of a discretionary power. But both the County and the Superior Courts put the case upon the want of power in the County Court.

In this we think there was error. The County Court had the power, and we do not doubt that if it had supposed that it had the power it would have exercised it in this case.

In the new and embarrassing circumstances which exist the master is to be much commended, for that he forbore the exercise of his own undoubted powers over his apprentice and invoked the powers of the court. It is best that the colored population should be satisfied that they are liable to no unlawful impressments, and that they should see that what is required of them has the sanction of the law. It may then be hoped that they will be contented, and will cheerfully submit to what they might otherwise mischievously resist.

PER CURIAM. There is error.

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(184)

Doe ex. dem. VALENTINE HOOVER and others v. JOHN W. THOMAS.

1. The lands granted to Henry McCulloch in 1745, are not liable to entry under the provisions of the Rev. Code, c. 42, s. 1.
2. A grant, under an entry of such lands in 1822, is void, and its invalidity may be shown, upon question made in an action of ejectment.

EJECTMENT, tried before his Honor, *Mitchell, J.*, at Special Term, December, 1866, of the Superior Court of Davidson.

The facts necessary to understand the opinion are sufficiently stated therein.

There was verdict below for the plaintiff, and a rule for a new trial having been obtained and discharged, and a judgment given for the plaintiff, the defendant appealed.

Bragg. Gilmer and *T. J. Wilson*, for the plaintiff.
Gorrell, for the defendant.

PEARSON, C. J. According to the view we take of the case, it is only necessary to notice one of the points made by the exceptions of the defendant, as upon that he is entitled to a *venire de novo*.

The defendant's counsel requested the court to instruct the jury that, by the Act of 1779, no land which had been confiscated was after the passage of that act the subject of entry, and that an entry and grant of such land was void.

His Honor refused to give the instruction. In this there is no error.

The instruction asked for assumes that the land in dispute is covered by the two grants by the crown to Henry McCulloch in 1745, and his Honor, in refusing to give the instruction, assumed this to be a fact.

So the only question is, was the land granted to McCulloch the subject of entry and grant, and can the grant to the plaintiff be treated as void in an action of ejectment?

(185) By the statute, Rev. Code, chap. 42, sec. 1, no land is the subject of entry and grant except "vacant and unappropriated lands." This land having been granted by the crown in 1745 to Henry McCulloch, was not vacant and unappropriated in 1822, at which time it was entered and granted to the lessor of the plaintiff. It follows, as a matter of course, that it was not the subject of entry.

We presume his Honor fell into the error, by allowing the matter to become confused and complicated by refernce to certain old statutes in which, out of abundance of caution, it is declared that confiscated land is not the subject of entry; and a statute by which confiscated land is granted to the University, which statute is afterwards repealed; and the Act of 1801, by which commissioners are appointed to sell all such confiscated land as had not been disposed of by the University. All of these statutes are marked in the margin of the revisal of 1820 "obsolete," for the simple reason that it was supposed there was no longer any subject-matter for the statutes to operate upon. But the truth is, that, apart from these statutes, the land granted to McCulloch was not vacant and unappropriated; the fact of its having been confiscated certainly did not make it vacant and unappropriated, so that it should become the subject of entry and grant.

The other point, that a grant for land which is not the subject of entry is void, and the objection may be taken advantage of in an action of ejectment, is settled by numerous adjudications; the distinction being, that when the land is vacant and the subject of entry, the grant is voidable, and must be vacated by *scire facias;* when the land is vacant, or, if vacant, is not the subject of entry, the grant is void, and advantage may be taken in ejectment. See the cases collected in Battle's Digest, title "Grant."

PER CURIAM. *Venire de novo.*

Cited: *State* v. *Bevers*, 86 N. C., 591.

(186)

THE STATE v. WILLIAM JOHNSON.

Where the prisoner in the night time knocked at the door of a dwelling-house, and, on being challenged from within, gave his name, in a feigned voice as that of a friend, and thus obtained immediate admittance and committed a robbery: *Held*, to be burglary.

(*State v. Henry*, 31 N. C., 463, cited and distinguished.)

BURGLARY, tried before *Fowle, J.*, at Fall Term, 1866, of the Superior Court of Caswell.

Upon the trial it appeared, by the confession of the prisoner, that he and others had obtained admittance in the nighttime into the dwelling-house of one Moore, and robbed him of money and other things, under the following circumstances: Near midnight, Moore, being in bed, with his door closed, heard a knock, and asked, "Who is there?" when the prisoner replied that it was Ned. Moore asked, "What do you want, Ned?" The prisoner replied that he had a letter for him. Moore sprang out of bed and started to the fire-place to strike a light, opening the door as he passed. As Moore was stooping at the fire-place the prisoner came behind him, pinioned his arms, tied him and committed the robbery.

It was also shown that Ned was the name of a negro man who was supposed to be a messenger between Moore and a young lady in the neighborhood; also the prisoner had confessed that he had imitated Ned's voice to deceive Moore.

Under the charge of the Judge the prisoner was found guilty, and thereupon sentence of death was pronounced upon him. A new trial was moved for and refused, and the defendant appealed

Attorney-General, for the State.
No counsel for the defendant.

PEARSON, C. J. There is no error. The prisoner, by artifice and fraud, procured the door to be opened, (187) and immediately thereafter entered. This, according to all of the authorities, amounts to a constructive breaking.

In *State* v. *Henry*, 31 N. C., 463, the Judges were unanimous in the opinion that when the entry was made immediately after the fastening of the door was removed, or so soon thereafter as not to allow a reasonable time for shutting the door and replacing the fastening, it amounted to a breaking. In that case the door was left unfastened, and the prisoner did not enter until after the lapse of some ten or fifteen minutes. A majority of the court, being unwilling to extend the doctrine of constructive breaking, held that there was no breaking, because no case had carried the doctrine to that extent. The other members of the court thought that it was a breaking.

This opinion will be certified, to the end that judgment may be pronounced in the court below.

PER CURIAM. There is no error.

AMANDA NEELY v. BURTON CRAIGE and JOSEPH W. HALL, Executors, etc.

1. An entry by a clerk upon the execution docket, in pursuance of a letter from the plaintiff's counsel that no execution was to issue until ordered by such counsel, has no effect in preventing the judgment from becoming dormant.
2. The acts of February, 1863, c. 34, and of 1866, c. 50, suspending the Statute of Limitations, do not prevent judgments from becoming dormant.

MOTION to strike out an entry upon an Execution Docket, and to set aside an execution; allowed by *Buxton, J.*, at Fall Term, 1866, of the Superior Court of Iredell. From that order the plaintiff appealed to this court.

(188) The facts are sufficiently set forth in the opinion of the court.

Boyden & Bailey, for the appellant.
Kerr, *contra.*

READE, J. Judgment passed at Fall Term, 1860, with a stay of execution for two years. After the expiration of the two years, the plaintiff's counsel wrote a letter to the clerk not to issue execution until ordered by him. The clerk entered upon his execution docket that no execution was to issue until ordered by the plaintiff's counsel.

At Fall Term, 1866, after notice to the plaintiff, the defendant moved to strike out said entry upon the execution docket; and also to set aside the execution which had been issued returnable to that term. His Honor allowed both motions. We see no error in this.

The entry was a mere memorandum of the clerk's, and was no part of the record, and improperly encumbered the same. The reason why the plaintiff thought it important to retain it was, that it operated as a continuation of the stay of execution, and kept the judgment alive, and, therefore, the execution would be regular as having been issued upon a living judgment. But the entry had no such effect. And the judgment became dormant after a year and a day from the expiration of the two years' stay of execution, *i. e.*, three years and a day from the date of the judgment. The judgment was dormant from and after Fall Term, 1863, but no execution issued until after Spring Term, 1866, and therefore it was issued upon a dormant judgment, and was properly set aside, on motion.

To this view it is objected that the Act of February, 1863, chap. 34, provides, that in computations of time, for the purpose of applying any statute limiting any action or suit, or any right or rights, etc., the (189) time elapsed since 20th May, 1861, shall not be counted; and that the Act of 1866, chap. 50, is of like import. And that, inasmuch as the plaintiff had the right in February, 1863, the time when the act was passed, to sue out execution, he had the same right in 1866, notwithstanding the lapse of a year and a day, because the act forbade the counting the time which had elapsed. If that construction of the statutes were allowed, the effect would be to revive every judgment in the courts since May, 1860, and to allow execution to issue without *scire facias*, or action of debt, for the statutes forbid the counting of time during the whole period since May, 1861. It would be not simply to prevent the plaintiffs in all suits from losing their rights and remedies by delay, but it would be to give them new rights and remedies which they had not before. Instead of only saving rights and remedies for indulgence given for the ease of debtors, it would give to plaintiffs a speedier remedy than they had before. We know that this would be against the policy of the whole legislation between creditor and debtor for the past six years Mr. Boyden, for the plaintiff, conceded that this construction of the acts would have that general effect, and that it would be in conflict with the whole policy of our legislation. But he sought to distinguish this case from others in this: that the judgment in this case was alive when the Act of February, 1863, was passed, and that the act did not revive what was dead, but only kept alive what was living, by forbidding time to be counted in the future. But the plain language of the act is, that time shall no more be counted in the past than in the future, and therefore, one construction must be common in all cases since May, 1861. And therefore the construction which we feel obliged to put upon those statutes is, that they give no new rights and accelerate no remedies, but only preserve existing ones; and that the application must be uniform to all cases, whether existing at the time of their passage, or before, or since.

(190) We find that this construction is in consonance with the ordinance of the Convention, entitled an ordinance to change the jurisdiction of the courts, passed the 23d of June, 1866, section 20, which provides: "That all acts and parts of acts suspending the operation of the statutes of limitation in the Rev. Code are hereby repealed, except as herein provided: *Provided*, that the time elapsed since 1st September, 1861, barring actions on suits," etc., "shall not be counted: *And provided further*, that nothing contained in this ordinance or in the acts hereby repealed shall be so construed as to prevent judgment from becoming dormant." If the execution in this case was issued before the passage of this ordinance, it was issued upon a dormant judgment, according to our construction of the

aforesaid acts. And if it was issued after the passage of the ordinance, which we presume was the fact, then the judgment was dormant by the express words of the ordinance. So that, in any light we can view the execution, it was irregularly issued, and was properly set aside.

PER CURIAM. There is no error.

Cited: *Morris* v. *Avery*, *post*, 239; *Hinton* v. *Hinton*, *post*, 414; *Blankenship* v. *McMahon*, 63 N. C., 181; *Johnson* v. *Winslow*, *Id.*, 553; *McIntyre* v. *Guthrie*, 64 N. C., 108; *Donoho* v. *Patterson*, 70 N. C., 656; *Benbow* v. *Robbins*, 71 N. C., 339, *Pearsall* v. *Kenan*, 79 N. C., 474.

WILLIAM FLYNT, Ex'r, etc., v. JAMES H. CONRAD.

1. Parol evidence is competent to show that a crop of corn, growing upon land at the time that the latter was conveyed by deed, did not pass by the deed, but was reserved by the vendor.
2. Distinction in this respect between *fructus industriales* and fruit upon trees, etc., discussed and stated.

(*Brittain v. McKay*. 23 N. C., 265; *Twidy v. Sanderson*, 31 N. C., 5, *Manning v. Jones*, 44 N. C., 368; *Daughtry v. Boothe*, 49 N. C., 87, cited and approved.)

TROVER, for corn, tried before his Honor, *Fowle, J.*, at Fall Term, 1866, of Forsyth Superior Court.

The facts were that the plaintiff's testator, on (191) the 23d June, 1865, executed to the defendant a deed in fee for a tract of land on which there was a growing crop of corn. Evidence of various acts and admissions was given to show that the crop had been reserved by the vendor. The defendant was shown to have converted it; and a demand and refusal were also shown.

The defendant's counsel asked his Honor to charge that the corn and everythng else upon the land passed by the deed, and that parol declarations by the defendant could not revoke the deed or raise any inference from which a tenancy at will could be set up.

His Honor charged the jury that a deed for land passed everything upon the land except what was legally reserved; and that a growing crop of corn could be sold by parol so as to pass the title; and could be reserved by parol so that the reservation would be binding; that if they were satisfied in this case that it was the intention of the parties at the time the deed was executed, that only the land should pass, and the growing crop should continue to be the property of the testator, the plaintiff would be entitled to recover; that the conduct and conversation of the parties afterwards, and the occupation of the land by the testator after the deed was executed, might be considered by them as evidence of what the intention of the parties was; and that if they were not satisfied that it was the intention of the parties that the crop should be reserved, the defendant would be entitled to their verdict.

Verdict for the plaintiff. Rule for a new trial. Rule discharged. Judgment, and appeal.

Gilmer and *T. J. Wilson*, for the plaintiff.
Bragg and *W. L. Scott*, for the defendant.

PEARSON, C. J. We concur in the opinion of his Honor for the reasons given by him.

(192) It is said by the court in *Brittain* v. *McKay*, 23 N. C., 265: "The law makes a pointed distinction between those profits which are the spontaneous products of the earth or its permanent fruits, and the corn and other growth of the earth which are produced annually by labor and industry, and thence are called '*fructus industriales.*' The latter, for most purposes, are regarded as personal chattels. Upon the death of the owner of the land before they are gathered, they go to his executor and not his heir. Upon the termination of an estate of uncertain duration, by an act other than that of the lessee, they belong to him as per-

sonal chattels, and do not go over to the owner of the soil. They are liable to be seized and sold under execution as personal chattels, and a sale of them while growing is not a sale of land or any interest in or concerning land, under the Statute of Frauds, but a sale of goods."

Thus it is seen that a growing crop is regarded as a personal chattel. The statute (Rev. Code, chap. 34, sec. 21), puts them on the same footing in another very important particular, and still farther lessens the difference by making it larceny to steal any Indian corn, wheat, etc., growing in a field. So that the only difference now seems to be that the one never was attached to land or has been severed, whereas the other is not severed; and the legal effect of this is, that when land is conveyed the presumption is that wheat, for instance, that has been cut and remains shocked in the field, does not pass with the land, whereas, if it has not been cut the presumption is that it does pass with the land; but the presumption in either case may be rebutted by the acts and declarations of the parties. If the grantee hauls in and houses the wheat that has been cut, with the knowledge and without objection on the part of the grantor, or if he admits that it was to belong to the grantee according to their agreement, no question would be made as to its being his property. The same (193) acts and declarations in regard to wheat growing would rebut the presumption and justify the inference that according to their agreement it was to remain the property of the grantor. This may be shown by parol evidence, for the Statute of Frauds does not apply to an agreement concerning a growing crop. Nor does the admission of parol evidence violate the rule that a deed shall not be added to, varied or contradicted by such evidence.

In the former case the parol proof that according to the contract of sale the grantee was to have the wheat that remained shocked in the field, does not add to the deed, for its purpose and effect was only to execute one part of the contract, and there is no reason why the other part may not be established by parol proof; so, and for the very same reason, in the latter case parol proof, that according to the agreement the grantee was not to have the growing crop, does not contradict the deed. It would be strange if the execution of one part of the agreement, in the only way in which it can be executed, should exclude proof and defeat the other part, for it must be borne in mind that the deed does not purport to set out the agreement.

In respect to fruit on trees and "not fallen," there is a diversity, for trees are a substantial and permanent part of the land, and a deed passing the land actually passes the trees as part thereof, and does not simply raise a presumption that it was the intention to pass them; hence, if there be a parol agreement to convey land and to except the fruit on trees, or certain timber trees, and a deed is executed which does not except the fruit or trees, that part of the agreement in respect to them is defeated, for the Statute of Frauds requires it to be in writing; and even if the agreement be in writing, that part of it can only be set up by a bill in equity to reform the deed on the ground of accident or mistake in the draftsman, for the effect of the deed is to pass the land and every substantial part of it.

(194) Our conclusion, that a growing crop differs only from a personal chattel in the circumstance of not being severed from the land, and that the presumption that it passes with the land is very slight, seems to be in accordance with the statute, Rev. Code, chap. 46, sec. 63. By the common law, if one died intestate his administrator took the growing crop as a part of the personal estate, and the heir took the land and the trees and fruit on them as part thereof. If he made a will the devisee took the crop under the presumption that, not being severed, it passed with the land, unless there was something in the will to rebut this presumption, in which case the executor took the crops. The statute makes the presumption the other way, to-wit, that the crop does not pass with the land to the devisee, but passes to the executor as a personal

chattel, unless it appears by the will that the devisee was to have it.

The doctrine that where there is a parol agreement, one part of which is carried into effect by a deed or other writing, that does not prevent the other part from being established by parol evidence, has been adopted and acted upon by our courts in several cases. *Twidy* v. *Anderson*, 31 N. C., 5: A hires a negro to B, who gives a note for $130, "being for hire of boy Evartson." A sued B for taking the boy out of the county, and offered to prove by parol that it was a part of the agreement that the boy should not be carried out of the county: *Held*, that the evidence was properly admitted, "for the note is not a memorial of the entire agreement, but is simply execution of a part." *Manning* v. *Jones*, 44 N. C., 368: A made a parol agreement to purchase a tract of land of B at an agreed price. B agreed farther that he would put certain repairs on the premises. B delivered a deed to A. The repairs not being made, A brought *assumpsit*, and offered to prove the agreement by a witness: *Hold*, that the proof ought to have been received, the deed being an execution of one part of the agreement, the other having been left in (195) parol. The proof offered was not to "add to, alter or explain the deed."

Daughtry v. *Booth*, 49 N. C., 87, presents the same question: *Held*, that a bond, given for the price of the hire of a slave and containing other stipulations as to his treatment and management, did not exclude parol evidence of another stipulation in the agreement, to-wit, that the slave was not to be taken out of the county.

There is no error.

PER CURIAM. Judgment affirmed.

Cited: Walton v. *Jordan*, 65 N. C., 172; *Bond* v. *Coke*, 71 N. C., 100.

THE STATE v. DAVID GLISSON and NEEDHAM COBB.

An indictment for larceny, charging the thing stolen as the property of A. B., " a person of color;" and concluding at common law, is good.

(*State v. Godet,* 29 N. C., 210, cited and approved.)

LARCENY, tried before *Buxton, J.*, at the Spring Term, 1866, of the Superior Court of Sampson.

Before the trial, the defendant moved to quash the indictment: (1) because it charged the horse, which was stolen, to be the property of "Redding Cowell, a person of color"; and (2) because it did not conclude "against the form of the statute." After they had been convicted, they moved the same objections in arrest of judgment. Both motions having been refused, the defendants appealed.

Attorney-General, for the State.
No counsel for the defendants.

READE, J. There is no doubt that in an indictment for larceny the owner of the property ought to (196) be described with reasonable certainty to a certain extent in general. But no additions to the name of the owner are necessary. *State* v. *Godet*, 29 N. C., 210.

It may be that, when we had two classes of colored persons, slave and free, it might have been necessary to charge the property as belonging to A, a free person of color, as distinguished from A, a slave. But however that may have been, it is not so now, as there is but one class of colored persons, and they are all free and capable of owning property. To describe a person now as a person of color is the same as to charge him as a free person of color, because all persons of color are free.

We see no reason why the indictment should conclude against the statute, as larceny is a common law offence.

The fact that the owner of the property may once have been a slave certainly can not make it necessary.

PER CURIAM. There is no error.

THE STATE v. JAMES MINTON.

An indictment for receiving stolen goods of a value less than twelve pence, must conclude *against the form of the statute.*

(*The State v. Beatty, ante,* 52, commented upon.)

INDICTMENT for receiving stolen goods, tried upon the plea of *Not Guilty*, at Spring Term, 1866, of the Superior Court of Wilkes, before *Mitchell, J.*

The goods alleged to have been stolen were described as "ten pounds of bacon, of the value of sixpence." The defendant was convicted, and having (197) moved without success in arrest of judgment, afterwards obtained a rule for a new trial, which having been discharged, he appealed.

Attorney-General, for the State.

No counsel for the defendant.

BATTLE, J. The receiving of stolen goods, unattended with the circumstance of receiving and harboring the thief, was at common law a distinct offence, but only of the grade of a misdemeanor. Roscoe's Crim. Ev., 867. The stolen goods, however, must have been of such a value as to constitute the offence of stealing them a grand larceny. The reason of this was doubtless because the offence partook of the nature of that of an accessory after the fact, and in petty larceny, which is the stealing of goods under the value of twelve pence, there were no accessories. Hence it was held in the case of the *State* v. *Goode*, 8 N. C., 463 (where the subject is fully discussed and considered), that the receiver of stolen goods, under the value of twelve pence, could not be convicted of a misdemeanor at common law. This view of the case is sufficient to dispose of the present indictment, because it concludes at common law, though it charges facts which at common law do not constitute an indictable offence. If the receiving of stolen goods of less value than twelve pence be a misdemeanor, as it undoubtedly is, it must of necessity be so by force of some statute. That statute is the fifty-sixth section of the thirty-fourth chapter of the Revised Code, which enacts "that if any person shall receive any chattel, etc., the stealing or taking whereof shall amount to a larceny or felony, either at common law or by virtue of any statute made or hereafter to be made, such person knowing the same to have been feloniously stolen or taken, every such receiver shall be deemed to be guilty of a misdemeanor and may be indicted and convicted, whether the felon stealing and taking such chattels, etc., shall or shall not have been previously convicted, or shall or shall not be (198) amenable to justice." This act evidently embraces every case of receiving stolen goods, whether the value be under or over twelve pence, and t does so without any aid from the twenty-sixth section of the same chapter of the Revised Code, which abolishes all distinction between grand and petty larceny. An indictment upon it must of course conclude against the statute, or it can not be supported.

It is proper for us to avail ourselves of this opportunity to correct a mistake committed inadvertently in the case of the *State* v. *Beatty*, *ante*, 52. In that case the counsel for the defendant contended that the second count of the indictment was bad because it did not contain an averment of the person from whom the stolen goods were received; and for this he cited and relied on the case of *State* v. *Ives*, 13 Ire., 338. The court assented to the proposition without adverting to the fact that the *State* v. *Ives* was decided upon the act contained in the Revised Statutes, chap. 34, sec. 54, and that the *State* v. *Beatty* was upon the act in the Revised

Code to which we have referred. In the Revised Statutes the language is: "If any person shall receive or buy any property that shall be feloniously stolen or taken from any other person, knowing the same to be stolen." etc., while in the Revised Code the words "from any other person" is omitted. This omission has prevailed upon the courts in England to adopt the construction upon their statute of 8 and 9 Geo. IV, chap. 29, that it is unnecessary to state in an indictment upon it the name of the person from whom the goods were stolen. *Jervis' case*, 6 Car. & Paine, 156 (25 Eng. C. L. Rep., 330); Ros. Cr. Ev., 868. Our act is manifestly taken from the British statute, and we presume ought to receive the same construction.

The motion to arrest the judgment in the case before us ought to have been sustained, and this must be certified to the court below.

PER CURIAM. Judgment arrested.

(199)

THE ATLANTIC BANK OF NEW YORK v. SIMEON FRANKFORD.

An affidavit amended by order of the court must be re-sworn to after amendment, or it will be considered as no affidavit.

ORIGINAL ATTACHMENT, before *Buxton*, *J.*, at Fall Term, 1866, of Rowan Superior Court, upon a motion to quash.

The view taken by the court renders it necessary to state only that the plaintiff was a corporation, chartered in New York, and had sued out an attachment against the effects of the defendant, making affidavit that the latter "is a non-resident of the State, or so absconds or conceals himself," etc. This attachment was returned to Spring Term, 1866, of Rowan Superior Court, and at Fall Term, 1866, upon motion by the plaintiff, the words, "is a non-resident of this State," above, were stricken out.

Before the amendment was allowed, the defendant had moved to quash the attachment, and after such allowance, this motion was overruled. Thereupon the defendant appealed.

Boyden and *Bailey*, for the plaintiff.
Blackmer and *McCorkle*, for the defendant.

READE, J. The plaintiff's counsel moved to amend the affidavit by striking from it certain words, and the court allowed the motion.

It does not appear that it was sworn to again after it was thus amended. It was then no affidavit at all, and the plaintiff could not be convicted of perjury if, as amended, it be false. The case stands then as if (200) there were no affidavit. An original attachment, without an affidavit to support it, is irregular, and may be quashed on motion.

There is error in the refusal to quash.

PER CURIAM. Judgment reversed.

Cited: Sheldon v. *Kivett*, 110 N. C., 411; *State* v. *Norman*, *Id.*, 488; *Brown* v. *Rhinehart*, 112 N. C., 775.

N. W. WOODFIN and T. W. PATTON, Ex'rs, etc., v. ERWIN SLUDER.

1. The provisions of the ordinance of October, 1865, in regard to the value of certain executory contracts "solvable in money," do not conflict with the Constitution of the United States.
2. Where a bond for money does not profess to set forth the other terms of the contract in the course of which it was given, parol evidence is competent to establish those others; therefore,
3. Where proclamation was made at a hiring by executors in January, 1865, that such money would be received as would pay the debts of the estate, reference being made specially to a bank debt: *Held*, that although no allusion to this was contained in the bonds given for such hires, it was competent for the obligors to show the proclamation, and also the market value of the notes of the bank.
4. A bond given in January, 1865, for the hire of slaves during that year, is subject to no deduction on account of Emancipation.

(*Daughtry v. Boothe*, 49 N. C., 87; *Twidy v. Sanderson*, 31 N. C., 5; *Manning v. Jones*, 44 N. C., 368, cited and approved.)

DEBT, tried before *Shipp*, *J.*, at Fall Term, 1866, of the Superior Court of Buncombe.

The bond upon which the suit was brought was for $2,000, dated 2d January, 1865, with condition reciting the hire of two slaves until the 25th of December, 1865, for the sum of "two hundred dollars," etc., and concluding as usual. Upon the trial below it was agreed that the slaves remained in the service of the defendant until the Federal troops reached Asheville, about the 25th day of April, 1865, when they went off with, (201) or under the influence of those troops; also, that it was proclaimed by the plaintiffs at the hiring that such money would be required as would pay the debts against the estate, and that none other would be required; and in this connection a large debt to the Bank of Cape Fear at Asheville was referred to, and perhaps other debts; it was also agreed that the notes of that bank could, at the time of the trial, be purchased at 25 cents in the dollar.

The parties submitted to his Honor the question as to the amount that the plaintiffs were entitled to recover, especially, whether they were entitled to recover for the entire year, or only for the time that the slaves served; also, whether defendant could pay in such funds as would pay the bank debt as above.

His Honor gave judgment, to be discharged by the payment of fifty dollars in specie, etc. From this judgment both parties appealed.

Boyden & Bailey, for the plaintiffs.

1. "Dollar" means the representative of 100 cents; Bouvier, and Webster, title *Dollar*. Such must be taken to be the meaning of that word in this bond, a meaning not to be varied by parol.

2. The ordinance of the 18th of October, 1865, so far as it affects this fundamental law of written contracts, is in direct conflict with the Federal Constitution. See Federalist, No. 44, Elliott's Debates *passim*. *Sturges* v. *Crowninshield*, 4 Wheat., 122; *Green* v. *Biddle*, 8 Wheat., 1; *Baltimore, etc.*, v. *Nesbit*, 10 How., 395; *Curran* v. *Arkansas*, 15 How., 304; *Hicks* v. *Hotchkiss*, 7 Johns. Ch., 297; *Commercial Bank* v. *Chambers*, 8 Sm. & M., 9; *Smith* v. *Morse*, 2 Cal., 524; *Quackenbush* v. *Darks*, 1 Denio, 128, S. C., 1 Comst., 129; *Planter's Bank* v. *Sharp*, 6 How., 301; *Golden* v. *Prince*, 3 Wash., C. C., 314; *Bruce* v. *Schuyler*, 4 Gilm., 221; *McMillan* v. *McNeil*, 4 Wheat., 209; 1 Kent
(202) Lect., 19; 2 Pars. Con., 509; *Barnes* v. *Barnes*, 53 N. C., 366.

No counsel for the defendant.

READE, J. If A hire a slave to B for a year, B during the year is the owner of the slave. And if the slave die during the year, A loses his general property and B loses his special property, *i. e.*, A loses the slave and B loses the hire. The emancipation of slaves during the year was their artificial death as slaves, and operated as would their natural death; therefore the defendant is liable for the hire during the whole of the year.

The bond upon its face is for $200. But it is stated in the case agreed that it was proclaimed at the hiring, as the terms thereof, that such money would be taken as would pay the debts of the estate; and special reference was made to a debt due the bank, which could be paid in its own notes, and that they were worth twenty-five cents in the dollar. If, therefore, we can look behind the bond to see what the contract was, it would seem that justice would be arrived at by a judgment for one-fourth of the amount of the bond.

The question then is, can we look for the agreement of the parties outside of the bond? If an agreement is reduced to writing, then the writing is the best evidence; and upon general principles it can not be varied by parol evidence. But it does not appear that the agreement in this case was reduced to writing. Indeed, it appears affirmatively that it was not. It is stated in the case agreed that it was proclaimed at the hiring that such money would be taken as would pay the debts of the estate, yet that is not stated in the bond. And the bond does not profess to set forth the agreement, but recites the fact that the hiring had taken place (203) before the bond was given; so that it appears, both by the case agreed and by the bond itself, that the agreement of the parties was before and outside of the bond, and that the bond was not intended to embrace all the terms of the contract, although it did embrace some, and was intended to secure the price. The case of *Daughtry* v. *Boothe*, 49 N. C., 87, was very much like this. In that case the defendant hired of the plaintiff a slave, with a stipulation that the slave should not be carried out of the county; and, as in this case, a bond was given for the price, but did not recite this stipulation. It was held that the stipulation might be proved by parol. The cases of *Twidy* v. *Sanderson*, 31 N. C., 5, and *Manning* v. *Jones*, 44 N. C., 368, are to the same point, and settle the question.

But allowing it to be true that when the whole contract is not set forth in the bond, and is not professed to be set forth, such portions as are outside may be proved by parol, yet it is insisted that so much of the contract as is set forth can not be contradicted by parol, and that here it is set forth that the price of the hiring is $200, and that dollars mean coin. Upon general principles those propositions are true; but the ordinance of the Convention of October, 1865, entitled "An ordinance declaring what laws are in force, and for other purposes," sec. 3, provides that in all executory contracts solvable in money, whether under seal or not, * * * it shall be competent for either party to show, by parol or other relevant testimony, what the understanding was in regard to the kind of currency in which the same are solvable; and in such case the true understanding shall regulate the value of the contract." That ordinance in terms embraces this case.

But then it is objected that the ordinance is void, as impairing the obligation of contracts. If it has that effect it is void, because the Constitution of the United States forbids a State, either in Convention or by the Legislature, to pass a law impairing the obligation of contracts.

(204) But it is not seen by us how an ordinance which facilitates the means of ascertaining what a contract is, and then enforces it, impairs its obligation. It is precisely the reverse.

We collect from the whole case that the contract was that for the hire of the slaves for the year 1865, the defendant should pay the nominal sum of $200, in such money as would pay debts, and that the true value of the contract was one-fourth of the sum, to-wit, $50 in coin.

Judgment was entered for that sum, with interest from the 1st of January, 1866, in the court below, and we see no error.

PER CURIAM. Judgment affirmed.

Cited: Harrell v. *Watson*, 63 N. C., 460; *Robeson* v. *Brown*, *Id.*, 555; *Wooten* v. *Sherrard*, 68 N. C., 338; *Bryan* v. *Harrison*, 71 N. C., 480; *Whitesides* v. *Williams*, 66 N. C., 144; *Dowd* v. *Railroad*, 70 N. C., 470; *Ray* v. *Blackwell*, 94 N. C., 13.

(205)

STATE v. ANDREW.

1. What amounts to such threats or promises as render confessions inadmissible, as being not voluntary; what evidence the Judge will hear to establish the facts of threats or promises; and whether there be any evidence to show that the confessions were not voluntary; are questions of law, and the decision upon them is subject to review in the Supreme Court. Whether the evidence, if true, proves the fact of threats or promises; whether the witnesses testifying to the court as to such fact are worthy of credit; and in case of conflict, which of them is to be believed, are questions of fact for the Judge, and his decision upon them is not subject to review.
2. Where there was some evidence that the confessions of the prisoner were not voluntary, and in his argument to the jury his counsel, for the first time, asked the Judge to withdraw them: *Held*, to be the duty of the Judge to decide whether the objection to the confessions came too late, and whether the jury should consider them as evidence.

(*State v. Dick*, 60 N. C., 440; *State v. George*, 50 N. C., 233, and *State v. Lawson*, *ante*, 47, cited and approved.)

ARSON, tried before *Merrimon*, *J*, at Spring Term, 1866, of the Superior Court of Buncombe.

The prisoner, late the slave of Robert L. Gudger, was indicted for burning a barn belonging to one John Reeves, in Madison County, where the indictment was found and whence the trial was removed. The evidence of the prisoner's guilt consisted mainly in his confessions, made while he was tied and under the charge of one T. R. James, who was acting as an officer. James and three other witnesses testified that the confessions were voluntary, and made without inducements by threat or promise. A witness for the defence testified that James did threaten the prisoner, and three others swore that James had told them before the trial that the prisoner would not have confessed had he not been "scared, and thought he would be hanged to the first limb." All the evidence was set forth in detail.

The confessions were not objected to till after the evidence was closed; but in his argument to the (206) jury, the prisoner's counsel asked the court to withdraw them. His Honor refused, but charged the jury that if they believed the prisoner had made confessions, they would give them such weight as they might think proper; they might believe them as a whole, or reject them as a whole; that they must consider of the circumstances under which they were made, in fixing the weight to be allowed them, etc.

Verdict of guilty. Rule for a new trial. Rule discharged. Judgment, and appeal.

Attorney-General, for the State.
Whitfield, for the prisoner.

PEARSON, C. J. "It is the duty of the Judge to decide the facts upon which depends the admissibility of testimony; he can not put upon others the decision of a matter, whether of law or of fact, which he himself is bound to make." *State* v. *Dick*, 60 N. C., 440. In that case the Judge decided the fact against the prisoner, and admitted the evidence; but, in his instructions to the jury he told them not to consider the confessions, if they believed them not to have been made voluntarily. This was held to be error, but one of which the prisoner could not complain, because "it could not by any possibility have wrought him harm." As the Judge had decided the fact against him, it was only giving him another chance to have the same fact passed on by the jury. What facts amount to such threats or promises as make confessions not voluntary and admissible in evidence is a question of law, and the decision of the Judge in the court below can be reviewed by this court; so, what evidence the Judge should allow to be offered to him to establish these facts is a question of law. So, whether there be any evidence tending to show that confessions were not made voluntraily, is a question of law. But whether the evidence, if true, proves these facts, and whether the witnesses
(207) giving testimony to the court touching the facts
are entitled to credit or not, and in case of a conflict of testimony which witness should be believed by the court, are questions of fact to be decided by the

Judge; and his decision can not be reviewed in this court, which is confined to questions of law. See *State* v. *George*, 50 N. C., 233, as to the manner in which the facts found by the Judge should be set out in a case made up for this court. There his Honor, finding the facts to be as sworn to by the witnesses, ruled that this did not amount to such threats as, under the circumstances, made the confessions not voluntary, and admitted them in evidence. This court reviewed that decision as a question of law. See also *State* v. *Lawson*, *ante*, 47.

In this case the Judge did not decide the preliminary fact upon which depended the admissibility of the confessions. Four witnesses, in their testimony to the court, if believed, proved the confessions made to James, the officer, were not made voluntarily, but under the fear of "being hung on the next limb." It was error for his Honor to pass this question by without a direct decision, and put on the jury the responsibility of deciding it upon evidence which was not offered to them, but to the court. The jury is sworn and empanneled to try the issues joined between the State and the prisoner at the bar, and not sworn and empanneled to try collateral matters preliminary to the admissibility of evidence. We can not say, in this case, that the error "could not, by any possibility, have wrought the prisoner harm"; we can not say how the jury regarded the matter, or what would have been the decision of his Honor if the question of the credibility of these witnesses had been squarely met by him. The duty of finding the facts preliminary to the admissibility of evidence is often a very embarrassing one, as in this case where there is a conflict of testimony. But this duty must be discharged by the Judge, and the evil of (208) allowing him to let the jury also pass on these facts is this: If he decide for the prisoner and reject the evidence, that is the end of it, whereas, if he decide for the State, and can leave it to the jury to review his decision, it is an inducement for him to decide *pro forma* for the State, and so the evidence goes to the jury without having the preliminary facts decided according to law. Under this view the second error in "*Dick's* case" "might by possibility have wrought him harm." We are relieved, however, by the fact, that as he had a *venire de novo* on the first ground, the ruling upon the second was not necessary to the decision; it may be for that reason it was not more fully considered by this court.

It is set out in the statement of the case sent to this court: "In the argument to the jury (not before) the prisoner's counsel asked the court to withdraw the confessions." The case shows that the testimony of four witnesses tending to show that the confessions were not made voluntarily had been offered to the court in the progress of the trial. This could only have been done for the purpose of excluding the confessions, and if his Honor, in the exercise of his discretion, ruled that the objection came too late, it was for him to take the responsibility of saying so, and it could not be avoided by leaving the matter to the jury.

We must be allowed to enter our protest against the unnecessary prolixity in the statement of cases made up for this court, which seems to be coming into practice. It is not a mere matter of taste. Costs are unnecessarily accumulated, and much is added to the labor of the members of this court when required to wade through such voluminous documents; it is almost literally to look for a needle in a hay stack. It is the privilege of the counsel of the appellant to make up a case for this court, in order to present the points of law, which answers the purpose of a bill of exceptions; but the case is made up under the supervision of the (209) Judge, and he should not yield to the importunity of counsel, and allow unnecessary detail of evidence and matter irrelevant, because the counsel do not choose to take the trouble of separating the wheat from the chaff.

PER CURIAM. *Venire de novo.*

Cited: *State* v. *Dula*, *post*, 214; *State* v. *Davis*, 63 N. C., 580; *Blue* v. *Railroad*, 117 N. C., 647; *State* v. *Vann*, 82 N. C., 633; *State* v. *Sanders*, 84 N. C., 730; *State* v. *Burgwyn*, 87 N. C., 572; *Smith* v. *Kron*, 96 N. C., 396.

DAVID PARKER v. BENJAMIN J. SHANNONHOUSE.

The clause of the Ordinance of the Convention of June, 1866, entitled "An Ordinance to change the jurisdiction of the courts," etc., which provides that no *scire facias* should be thereafter issued to revive dormant judgments, and that every *scire facias* then pending should be dismissed at defendant's cost, is not unconstitutional.

MOTION to dismiss a *scire facias*, before *Warren*, *J.*, at Fall Term, 1866, of the Superior Court of Perquimons.

The plaintiff, on the 23d April, 1866, sued out a *scire facias* to May Term of the County Court, to revive a dormant judgment in that court. Pleas were entered at the return term, and at August Term, upon motion of the defendant's counsel, the court gave judgment dismissing the *scire facias*, and the plaintiff appealed to the Superior Court. In that court his Honor overruled the motion to dismiss and gave judgment that a *procedendo* issue to the County Court. The defendant, thereupon, appealed to this court.

Smith, *Yates* and *W. A. Moore*, for the plaintiff.
Bragg, for the defendant.

PEARSON, C. J. We think his Honor erred in overruling the motion to dismiss the *scire facias*.

The motion presented the question of the con- (210) stitutionality of the ordinance of the Convention—that no *scire facias* shall thereafter be issued to revive a dormant judgment, and every *scire facias* then pending in court shall be dismissed at the costs of the defendant. Without reference to the wisdom or policy of this enactment, the naked question is, Had the Convention power so to ordain?

We find by reference to the books that, at common law, the remedy of the creditor was an action of debt on former judgment. The Statute, 13 Edw. I, chap. 15, re-enacted in the Rev. Code, chap. 31, sec. 109, gives to the creditor an additional remedy by *scire facias.* The effect of the ordinance is to repeal the Statute, 13 Edw. I, and leave the creditor to his common law remedy. This does not impair the obligation of the contract, but simply takes from the creditor the additional remedy provided by statute, and leaves him to his common law remedy; so the ordinance does not impair the obligation of the contract or deny a remedy. This the Convention, which represented the people as if assembled "in campis," had the power to do.

There is error.

PER CURIAM. Judgment of the court below reversed; and judgment here that the *scire facias* be dismissed at defendant's costs.

Cited: Bingham v. *Richardson*, *post*, 316; *Mardre* v. *Felton*, *post*, 280; *White* v. *Robinson*, 64 N. C., 701; *Gay* v. *Grant*, 101 N. C., 215.

(211)

STATE v. THOMAS DULA.

1. To the rule requiring testimony to be subjected to the *tests* of "an oath" and "cross-examination" there are exceptions, arising from necessity. One of these consists of declarations, which are part of the *res gestæ*.
2. This exception embraces only such declarations as give character to an act; therefore, when the deceased was met a few miles from the place where she was murdered, going in the direction of that place: *Held*, that her declarations, in a conversation with the witness, as to where the prisoner was and that she expected to meet him at the place whither she was going, were not admissible against him.
3. What facts amount to an agreement to commit a crime between the prisoner and one charged as accessory, so as to render competent the acts and declarations of the alleged accessory, is a question of law, and the decision of the court below upon it is subject to review in the Supreme Court.
4. So, whether there is any evidence of a common design. But whether the evidence proves the fact of common design, whether the witnesses are worthy of credit, and in case of conflict, what witnesses should be believed by the Judge, are questions of fact for him to decide, and are not liable to review.

(*State v. George*, 29 N. C., 321, and *State v. Andrew*, *ante*, 205, cited and approved.)

MURDER, tried before *Buxton, J.*, at Fall Term, 1866, of the Superior Court of Iredell.

The prisoner was indicted as principal, and one Ann Melton as accessory before the fact, in the murder of one Laura Foster, in Wilkes County in May, 1866. The bill was found at Fall Term, 1866, of Wilkes Superior Court, and upon affidavit, removed to Iredell. The prisoner and Ann Melton were arraigned together, but, upon motion of the counsel for the former, there was a severance, and he put upon his trial alone.

The case, as made out by his Honor, contained a statement of all the evidence, and was quite voluminous. There were several exceptions by the prisoner on account of the admission of improper testi- (212) mony. The opinion of this court makes it unnecessary to state them all, or to detail the evidence.

The body of the deceased was found a few weeks after she disappeared near a locality called "the Bates Place," and was recognized. There were plain indications that the deceased had been murdered; and the testimony relied on to prove the guilt of the prisoner was circumstantial.

One Betsey Scott testified that she saw the deceased the morning of the day she was missing; "she was riding her father's mare, bare-back, with a bundle of clothes in her lap," etc. It was then proposed to prove by the witness that in a conversation that ensued between her and the deceased, the latter said she was on her way to the Bates place; that the prisoner had returned just before day, was going another way, and she expected to meet him at the Bates place. The prisoner objected to the declarations, as not being a part of the *res gestæ;* but the testimony was admitted.

The other exceptions were principally to the admission of evidence of acts and declarations of Ann Melton. The prisoner contended that such evidence should not go to the jury unless a common design between him and Ann Melton had first been established. His Honor overruled the exceptions, and the testimony was admitted.

Verdict of Guilty. Rule for a new trial. Rule discharged. Motion in arrest of judgment. Motion overruled. Judgment of death, and appeal.

Attorney-General and *Boyden*, for the State.
Vance, for the prisoner.

PEARSON, C. J. The case discloses a most horrible murder, and the public interest demands that the perpetrator of the crime should suffer death; but the public interest also demands that the prisoner, even if he be guilty, shall not be convicted, unless his (213) guilt can be proved according to the law of the land.

The conversation between Mrs. Scott and the deceased ought not to have been admitted as evidence. At all events, no part of it except that the deceased said she was going to the Bates place. How what the deceased said in regard to the prisoner's having come just before day, and where he was, and that she expected to meet him, can in any sense be considered a part of the acts of the deceased—being on her father's mare, bare back, with a bundle of clothes in her lap, and coming from her father's past A. Scott's house, when the witness met her in the road—we are unable to perceive. The law requires all testimony, which is given to the jury, to be subjected to two tests of its truth: (1) It must have the sanction of an oath. (2) There must be an opportunity of cross-examination. Dying declarations form an exception, and another exception is allowed when declarations constitute a part of the act, or *res gestæ*. Acts frequently consist not only of an action or thing being done, but of words showing the nature and quality of the thing. In such cases, when the action or thing being done is offered in evidence, as a matter of course the words which form a part of it must also be received in evidence, as if one seizes another by the arm, saying, I arrest you under a State's warrant, these words are just as much a part of the act done as the action of taking him by the arm.

In this case the conversation between Mrs. Scott and the deceased, although it occurred at the time of the action or thing being done, to-wit, her being in the road on her father's mare, bare back, can not, in any point of view, be considered a part of the act. It was entirely accidental, and consisted simply of answers to inquiries which the curiosity of Mrs. Scott induced her to make. These answers may have been true, or they may have been false, but they were not verified by
(214) "the testes" which the law of evidence requires, and it was error to admit them as evidence against the prisoner.

As the case must go back for another trial, we do not feel at liberty to enter into an expression of opinion in regard to the other matters of exception. But we see from the case sent that his Honor fell into the error, for which a *venire de novo* is awarded at this term in

State v. *Andrew*, *ante*, 205. That is, without stating distinctly how he decided the facts, preliminary to the admission of the acts and declarations of Ann Melton in furtherance of a common purpose to murder the deceased; upon the evidence offered to the court to establish these preliminary facts he allows the evidence to go to the jury, and instructs them that if they are not satisfied of the existence of a conspiracy between the prisoner and Ann Melton to effect the murder of the deceased; in that case they are to give to the acts and declarations of Ann Melton, which had been admitted as evidence to them no weight, and are not to be influenced by them. What facts amount to such an agreement between the prisoner and Ann Melton, to aid and assist each other in effecting the murder of the deceased, as to make her acts and declarations in furtherance of the common purpose evidence against him, is a question of law, and the decision in the court below may be reviewed in this court; so, what evidence the Judge should allow to be offered to him to establish these facts is a question of law; so, whether there be any evidence tending to show the existence of such an agreement is a question of law But whether the evidence, if true, proves these facts, and whether the witnesses giving testimony to the court touching the facts are entitled to credit or not, and, in case of a conflict of testimony, which witness should be believed by the court, are questions of fact to be decided by the Judge, and his decision can not be reviewed in this court. See *State* v. *George*, 29 N. C., 321, and *State* v. *Andrew*, *ante*, 205, where the subject is fully explained. (215) The remarks made in that case are applicable to this, not excepting what is said in reference to the prolixity of cases made up for ths court.

In speaking of the connection necessary to be found between the prisoner and Ann Melton as preliminary to the admissibility of her acts and declarations, in furtherance of the common purpose, as evidence against him, I have used the word "agreement" to aid and assist each other to effect the death, in preference to the word conspiracy; for, although they have the same meaning, yet the latter is apt to lead to a confusion of ideas. If parties are indicted for a conspiracy to murder or do some other lawful act, in that case the issue joined on the plea of not guilty is the fact of the conspiracy; the endeavor to prove it must, of course, be given to the jury and passed upon by them. Otherwise, where the indictment is for the murder or other act, and the fact of an agreement to aid and assist is only preliminary to the admissibility of the acts and declarations of one against the other.

PER CURIAM. *Venire de novo.*

Cited: State v. *Dula, post,* 440; *Devries* v. *Phillips,* 63 N. C., 208.

MERRITT AUSLEY v. DANIEL ALDERMAN and others.

1. The value of a bond or note within the meaning of Rev. Code, ch. 31, sec. 38, is the principal and interest due on it.
2. When the value of a note is reduced by endorsed credits to less than $100, an action brought to the County or Superior Court on such note, may be abated on plea of the defendant.

(*Birch v. Howell*, 30 N. C., 468, cited and approved.)

DEBT upon a note, carried by appeal from the County Court of Robeson to Fall Term, 1866, of the Superior Court, *Gilliam, J.*, presiding.

Upon Oyer at the appearance term in the (216) County Court it appeared that the note declared on, bearing date November 3, 1865, was for $135; and there were indorsed credits of $50 and $16, dated December .., 1865, and July 14, 1866, respectively. Thereupon, the defendant pleaded in abatement that the amount sued for "was less than the sum of which the court had jurisdiction." The plea was overruled in the County Court; in the Superior Court it was held good, and the judgment was, that the writ be quashed, and that the defendant recover his costs. The plaintiff appealed.

Leitch, for the plaintiff.
W. McL. McKay, for the defendants.

READE, J. The statute, Rev. Code, chap. 31, sec. 38, provides that no action shall be originally commenced in the County or Superior Court for any balance of less value than one hundred dollars due on any bond, promissory note, or liquidated account signed as aforesaid." "And if any action shall be commenced in any of said courts contrary to the provisions of this section, or if the sum sued for, which may be truly due and owing, is of less value than that for which the action is hereby allowed to be commenced in said court, the same may be abated on plea of the defendant. or, if the matter appear on the writ or declaration, may be dismissed, on motion."

The value of a bond or note within the meaning of that statute, is the principle and interest due on it. *Birch* v. *Howell*, 30 N. C., 468. The balance of principle and interest due upon the note sued on in this case was less than one hundred dollars, and therefore the suit can not be maintained. It would be otherwise, if the amounts were reduced by sets off offered by the defendant. But here it appeared by the face of the note and the payments indorsed, that the "balance due was of less value than one hundred dollars."

PER CURIAM. There is no error.

(217)

SAMUEL T. STANCILL v. J. F. BRANCH.

Where a constable had levied an execution on land and returned the same to the County Court, and from an order in that court overruling a motion for a *vendi exponas* the plaintiff appealed: *Held,* that the whole record was carried up and the Superior Court had the power upon motion, made for the first time, to allow the constable to amend his return.

(*Morehead v. R. R.*, 52 N. C., 500, and *Phillipse v. Higdon,* 44 N. C., 380, cited and approved; *Russell v. Saunders*, 48 N. C., 432, and *Smith v. Low,* 24 N. C., 457, cited, distinguished and approved.)

MOTION, to allow a constable to amend his return of a levy upon land, made before *Gilliam, J.*, at Fall Term, 1866, of the Superior Court of Northampton. The motion was refused, and from this judgment, and from a judgment denying a motion for a *vendi. exponas*, the plaintiff appealed to this court.

The plaintiff, on the 9th of June, 1866, recovered a judgment before a justice of the peace against the defendant for $100, with interest and costs, and upon an execution issued the same day the constable made the following return to the County Court: "June 9, 1866. Levied upon a certain tract of land as the property of J. F. Branch to satisfy within judgment, said land adjoining," etc. Upon this return and proof of notice, the plaintiff moved for a *vendi. exponas*, which was refused, and he appealed to the Superior Court. In that court the plaintiff moved that the constable be permitted to amend his return by inserting after the date the words, "for the want of goods and chattels." His Honor was of opinion that he had not the power to permit the amendment, and refused the motion; and also a motion for a *vendi. exponas*.

Peebles and *Rogers & Batchelor*, for the plaintiff.
Bragg for the defendant.

(218) BATTLE, J. One question presented by the record is, whether the Superior Court had the power to allow the constable to amend his return upon

the motion of plaintiff, made for the first time in that court. The answer to this question depends upon a preliminary inquiry as to the effect of the appeal from the order made in the County Court, refusing to grant a writ of *venditioni exponas.* Did it take up the whole record, so that if the order were reversed in the latter court the writ of *vendi. exponas* could issue from that court, or would it be necessary to order a writ of *procedendo* to the County Court? We think that, upon both principle and authority, the whole case was taken up to the Superior Court, and that court acquired full jurisdiction of the matter in contest. The refusal of the County Court to grant the plaintiff's motion for a writ of execution to have the land levied on sold, was an adjudication against him of all that he demanded or could demand in that suit. If that adjudication were proper, his suit was at an end in that court; but, as it was made in an inferior tribunal, he had a right given him by law to have the matter reviewed in a Superior Court, and that could not be effectually done unless the latter could have a transcript of the whole record of the former before it. In this respect the case differs from that of *Russell* v. *Saunders*, 3 Jon., 432, where the County Court permitted a prosecution bond to be filed, though none had been given before, and from the order granting such permission the defendant appealed to the Superior Court. That order was upon a collateral matter, not at all affecting the merits of the suit in which it was made; and hence it was held that the appeal carried up only the matter connected with the order, leaving the records of the main suit still in the County Court. The case of *Morehead* v. *Railroad*, 52 N. C., 500, more nearly resembles the present. In that the defendant pleaded in abatement to the jurisdiction of the County Court, to which the plaintiff demurred, (219) but the demurrer was overruled and the plea sustained, upon which the plaintiff appealed; and it was held that the appeal took the whole case up to the Superior Court.

If our process of reasoning be correct, and the transcript of the whole record of the County Court in the present case was properly carried up to the Superior Court, the plaintiff had the same right to move that the constable be permitted to amend his return, so as to make it speak the truth, as he had to make a similar motion in the County Court. With the single exception of being in a higher tribunal, the proceeding was the same in the Superior as it was in the County Court, and being so, we can not conceive of any good reason why the former court should not have the same right to entertain a motion to amend as the latter. And we think the Superior Court not only had the power to entertain the motion, but also to grant it, if in its discretion it thought proper to do so.

The case falls under the first division of the third class of amendments spoken of in the case of *Phillipse* v. *Higdon*, 44 N. C., 380. If it be true that the defendant, in the justice's execution, had no goods or chattels upon which the constable could levy, then, in entering his return of a levy upon land, it was of course a mere oversight in him to omit stating that his levy was made on the land for the want of goods and chattels. And in such a case the court may allow the amendment, even though third persons may be thereby affected, if, under all the crcumstances of the case, the purposes of justice will be subserved by doing so. *Bender* v. *Askew*, 14 N. C., 149.

But it is objected that the Superior Court has no power to allow the amendment of the return of an officer made to the County Court, and the case of *Smith* v. *Low*, 24 N. C., 457, is relied upon in support of the position. It is true that the Superior Court has no such power, when the record of the suit in the County Court in which the return is made is not before the (220) Superior Court. This will be the case when land is sold under a *vend. expo.* issued from the County Court, and an action of ejectment is afterwards brought by the purchaser in the Superior Court. If, in such case, it be afterwards discovered that there is a defect in the return of an officer made to the County Court, the Superior Court can not have it amended by the officer because it is not within its control. The difference between that case and the one before us is manifest. Here the whole proceedings are in the Superior Court, and it has the same power of amendment of any part of them which the County Court had while they were before it.

Our conclusion is, that the Superior Court erred in deciding that it had not the power to permit the constable to amend his return, and for this error the judgment must be reversed.

PER CURIAM. Judgment reversed.

STATE v. THOMAS B. TISDALE.

Where a defendant was indicted in several counts and found guilty upon two: *Held*, no ground for arrest of judgment that one of the two was defective, the judgment being such as the court had a right to render on the other.

(*State v. Williams*, 31 N. C., 140, cited and approved; *State v. Miller*, 29 N. C., 275, cited, distinguished and approved.)

INDICTMENT, in three counts, charging the defendant with unlawfully trading with a slave, larceny, and receving stolen goods, knowing they were stolen, tried before *Merrimon, J.*, at Spring Term, 1866, of the Superior Court of Nash.

The indetment was found at Fall Term, 1863.

(221) The article of which the defendant was charged in the several counts to have come into the criminal possession was a set of buggy harness. The jury found a verdict of "Guilty" upon the first and third counts, and "Not Guilty" upon the second. The defendant moved in arrest of judgment. Motion overruled. Judgment, and appeal.

The opinion renders a statement of the charge of his Honor unnecessary.

Attorney-General, for the State.
Batchelor, for the defendant.

BATTLE, J. The indictment in this case is framed in pursuance of the provision in the Rev. Code, chap 35, sec. 23, which declares that a defendant "may be charged in the same indictment in several counts, with the separate offences of unlawfully trading with slaves, receiving goods, knowing them to be stolen, and larceny."

It is unnecessary to decide whether his Honor's instructions to the jury, that they might find the defendant guilty generally upon all the counts, or guilty upon one or two of them, and not guilty upon the other or others, or not guilty upon all, were true or not, because the verdict was guilty upon the first and third counts, and not guilty upon the second, and the first is manifestly bad. There being one good count it is sufficient to support the judgment which was pronounced, it being such as the court had a right to give upon it. In *State* v. *Miller*, 29 N. C., 275, referred to and relied upon by the defendant's counsel, both counts were good, and an error was committed in the instructions given by the court with reference to the more aggravated of the two. This was held to be a sufficient cause for awarding a *venire de novo*, because a higher fine may have been imposed on account of the conviction on the count with regard to which the erroneous instruction was given. But in that very case the court (222) said: "It is true, when one count in an indictment is defective and another count is good, and there is a general verdict, a motion in arrest can not be sustained, for the good count warrants the judgment; and, although the punishment is discretionary, the judgment is presumed to have been given upon the good count." The case before us is precisely similar in principle. The second count is put out of the way by the finding of the jury that the defendant is not guilty thereon, and then the verdict upon the other two counts is in effect a general verdict of guilty. The former of these two is bad, because the article mentioned in it is not one of those the trading for which was prohibited by the eighty-fifth section of the eighty-fourth chapter of the Revised Code, and the judgment is such an one as the court had a right to render on the latter count, and must therefore be presumed to have given upon it. See also *State* v. *Williams*, 31 N. C., 140.

PER CURIAM. There is no error.

STATE v. COLUMBUS PENLAND.

1. An indictment for the murder of a person, who was a slave at the time of his death, can not be supported unless the fact of his being a slave is set out.
2. What constitutes a sufficient *descriptio personæ in bills of indictment* charging offenses by or upon persons in the different classes of society, stated by PEARSON, C. J.

(*State v. Scott*, 8 N. C., 24, cited, distinguished and approved.)

MURDER, tried before *Shipp, J.*, at Fall Term, 1866, of the Superior Court of Buncombe.

The prisoner, a person of color, was indicted with two others for the murder of "one John Wilson, a (223) person of color," in the county of Yancey, whence the trial was removed. It was proved that the homicide was committed in March, 1865, and that at that time the deceased was the slave of one Edney, who had purchased him of one Wilson. It was also proved that the deceased was known by the name of John Wilson after he was purchased by Edney, and up to the time of his death; and that there was no other person of color known by that name in the county of Yancey.

The counsel for the prisoner asked the court to charge that there was a variance between the allegation and proof. This was refused, and the prisoner's counsel excepted.

Verdict of guilty as to the prisoner. Judgment of death, and appeal.

Attorney-General, for the State.
No counsel for the prisoner.

PEARSON, C. J. After the emancipation of the slaves, "a person of color" is a sufficient description to show his status; and it is no longer necessary to use the word "free," in order to describe a free negro; for now they are all free. In our case the deceased was a slave at the time of his death, and the attention of the Solicitor who drew the bill of indictment seems not to have been called to that fact; and the question is, can an indictment for the murder of a slave, in which the fact of his being a slave is not set out, be supported.

There is no case to be found in our books of an offence committed by a slave, or upon a slave, in which the indictment does not set out the fact of his being a slave. Immemorial usage seems to have divided our community into three classes, in reference to the form of bills of indictment: (1) In regard to a white man, his Christian and surname is enough. (2) As to a free per-
(224) son of color, besides his Christian and surname,
his status as a free person of color is set out in every precedent that we have been enabled to find. (3) In the case of slaves, they are described by their Christian name only, for most usually they have no surname, and the fact of being a slave added to the Christian name is considered a sufficient description. In *State* v. *Scott*, 8 N. C., 24, the fact that Caleb was a slave is set out in the indictment, and the case is made to turn upon a point to which we will take occasion to refer below. In our case the fact that the deceased was a slave is not set out in the indictment, and, in the absence of any authority to support this departure from the precedents, we feel bound to adhere to the "ancient landmarks of the law." Suppose an indictment charge the killing of a "human being"—that would be too indefinite; or the killing of "Caleb," without further description—who could tell whether "Caleb" was a horse, a mule or a slave? And, the suggestion that this uncertainty might, on a plea of *autre fois acquit*, be re-

moved by affidavit and proof of the fact that "Caleb" was a slave, does not meet the objection; for the prisoner is entitled at the outset to be informed of the offense with which he stands charged, and there can be no reason why he should be afterwards subjected to the trouble and inconvenience of being obliged to prove matters which ought to appear on the face of the record.

In short, we feel bound, very reluctantly, to award a *venire de novo;* for, of course, the Solicitor will send a new bill with the proper averments; but the prisoner is entitled to the tenderness of the law in favor of life, and to take the chances.

We will not advert to "Scott's case," which was much pressed on the argument.

The indictment charges the killing of Caleb, a slave, the property of Fred. S. Marshall, and the court held that it was not necessary to prove property in (225) Fred. S. Marshall, and put their decision on "Pye's case" (2 East Cr. L., 785). It is not necessary for us to quarrel with this case, for the indictment sets out that "Caleb" is a slave, which answers our purpose; but we will take occasion to remark that the decision is not supported by Pye's case, upon which it purports to rest. In Pye's case it is held that the place at which an act is done does not enter into the essence of the offence, and a variance between the allegation and proof in regard to place is not fatal; as, if an assault and battery be alleged in a dwelling house, and the proof shows it to have been in the street; for, provided it be within the county, the exact spot is immaterial. It is laid down generally in the books that "time and place" need not be proved as laid, except when time or place enters into the essence of the offence, and is a necessary part of the description; and it is also laid down that whatever is alleged as a part of the description must be proved as laid, although the allegation need not have been made. So, if we suppose it sufficient to charge the killing of Caleb, a slave, without saying to whom he belonged, if the additional description is made, that it is Caleb, a slave who belongs to

A B, it must be so proved, for it is a part of the description by which this Caleb is distinguished from another Caleb, the property of C D.

There is error.

PER CURIAM. *Venire de novo.*

(226)

SALLIE ROYSTER v. ROSELLA ROYSTER and others.

1. A deed of bargain and sale is not void because of informality, if its terms be such as to show the intention of the parties.
2. A limitation in a deed of bargain and sale to one for life, with remainder in fee to another, the consideration being expressed to have been paid by the latter, is valid.
3. The widow of the remainderman in such case, the tenant for life surviving him, is not entitled to dower.

(*Cobb v. Hines*, 44 N. C., 343, and *Smith v. Smith*, 46 N. C., 135, cited and approved.)

PETITION for dower, heard, upon a case agreed, by *Gilliam, J.*, at Fall Term, 1866, of the Superior Court of Person.

The material facts set forth in the case agreed are as follows:

The petitioner is the widow of one Solomon Royster, who died in the year 1865 in Person County. One Prudence Mason, the aunt of Solomon Royster, before her death in 1852, published a will, which has been duly admitted to probate, containing the following clause: "I give and bequeath to my nephew, Solomon Royster, all of my monied estate after my just debts have been paid, for the special purpose of purchasing a tract of land, for a home for himself, his mother Nancy Royster, my niece Mary Ann Royster," etc. "For his mother Nancy Royster, as long as she may live, and for my nephews and nieces named above, as long as they may remain unmarried, and after my nephew Solomon Royster shall have complied with and performed the above special purpose, then the sole right and title shall vest in him, the said Solomon Royster, his heirs and assigns forever." In 1854 Solomon Royster, in pursuance of the provisions of that clause, purchased a tract of land of one Willis T. Royster, who executed a deed for the same. After the premises, in which Solomon Royster is described as "administrator of Prudence Mason," the deed proceeds: "That whereas the said (227) Willis T. Royster has sold a certain tract of land hereinafter described to Solomon Royster, administrator of Prudence Mason, deceased, for valuable consideration, to-wit, five hundred dollars, the said tract said to contain one hundred and six acres, etc. (describing it). The said land is to be Mary Royster's during her lifetime, after which time the right and title belongs to Solomon Royster his heirs forever." A clause is added warranting the title "to Solomon Royster or his heirs."

Solomon Royster owned an interest at the time of his death in no other land than that conveyed to him as above. His mother, Nancy Royster, survived him, and is one of the parties-defendant. He left two children who are also parties.

His Honor was of opinion that the petitioner was not entitled to dower in the land, and gave judgment accordingly; whereupon the petitioner appealed.

Jordan and *Moore*, for the petitioner.
No counsel for the defendants.

BATTLE, J. The petition for dower being a proceeding at law, the question as to the plaintiff's right will depend upon the title acquired by her husband under the deed executed to him by Willis T. Royster, whether limitations in said deed are in accordance with the directions of the will of Prudence Mason or not. Were the case in equity the court might order the deed to be reformed, if it were found that the trusts of the will were not carried out in the deed for the land which the textatrix directed the plaintiff's husband to purchase.

But here we are bound to take the deed as it is, and to put such a construction upon it as the rules of law require.

The deed is one of bargain and sale, which derives its force and effect from the operation of the statute of uses. It is rather informal, but if is expressed in (228) such terms as to enable us to discover the intention of the parties, and that is sufficient to give it validity. 2 Black Com., 298; *Cobb* v. *Hines*, 44 N. C., 343. This intention is evidently to limit an estate for life in the land to Nancy Royster, the mother of the bargainee, and the remainder to him in fee.

Can this be done in a deed of bargain and sale in which the pecuniary consideration is recited to have been paid by the remainderman? We think it may. It is well known that the *modus operandi* of a bargain and sale of land is that the valuable consideration paid by the bargainee raises a use, and then the statute immediately transfers the legal estate. But it is not required that the consideration of value shall necessarily be paid by the bargainee himself. The money or other thing of value may be paid by another person for him.

Thus it is said in the case of *Smith* v. *Smith*, 48 N. C., 135: "That a bargain and sale to B, in consideration of value paid by a stranger for and on account of B, raises the use in B, and the statute carries the legal estate. So if one, in consideration of value paid by A, bargains and sells the land to A for life, remainder to B in fee, it will be intended that A paid the consideration, as well on account of B as for himself."

It is clear that the principle is the same where the money is paid by the remainderman, instead of the tenant for life, which is the case before us. See *Mildway's case*, 1 Rep., 176, b.

The intendment af the law to which we have alluded is, in the present case, fortified by the fact that the consideration of the deed purports to have been paid by the bargainee as the administrator of Prudence Mason, whose will directs the money to be laid out in the purchase of land, as well for the benefit of the bargainee's mother as for himself. The mother thus taking as tenant for life, and having survived her son, he (229) was never seized of such an estate in the land as entitles his widow to claim dower therein.

The judgment given upon the case agreed must be affirmed.

PER CURIAM. Judgment affirmed.

STATE v. JAMES M. HENDERSON.

A colored woman, the mother of a bastard child, has such an interest in proceedings in bastardy, within the meaning of the act of 1866, c. 40, s. 9, as to render her a competent witness against a white man, whom she alleges to be the father.

(*State v. Ellis*, 34 N. C., 264, cited and approved.)

BASTARDY, heard upon a motion to quash the proceedings, before *Buxton, J.*, at Fall Term, 1866, of the Superior Court of Mecklenburg.

The facts of the case are sufficiently set forth in the opinion.

Attorney-General, for the State.
Vance, for the defendant.

READE, J. Upon the return of the proceedings in bastardy to the County Court, the defendant moved to quash, "for the reason that the oath of the mother, a freed woman, should not be taken against him, a white man." The proceedings were quashed, and the Solicitor for the State appealed to the Superior Court. In the Superior Court the decision of the County Court was affirmed, his Honor being of the opinion "that if this was a criminal proceeding, then the Act of 10th March, 1866, ought not to have an *ex post facto* opera- (230) tion; and that if it was a civil proceeding, then the mother had no interest in the suit, and was no party of record,'' and was therefore incompetent to testify against the defendant.

The Act of 1866, chap. 40, sec. 9, provides that persons of color, not otherwise incompetent, shall be capable of bearing evidence in all controversies at law, or in equity, where the rights of persons or property of persons of color shall be put in issue, and would be concluded by the judgment or decree of the court; and also in pleas of the State, where the violence, fraud or injury alleged shall be charged to have been done by or to persons of color: *Provided*, that no person shall be deemed incompetent to bear testimony in such cases, because of being a party to the record or in interest.''

The question is, whether any person of color had an interest in this suit?

We think that the mother of the bastard had an interest in the proceedings, and that her interest would be concluded by the judgment of the court. The child was not sworn until some ten months after its birth, during which time she had supported it, and she was entitled to be reimbursed for her outlays, and it is usual for the court to provide for her reimbursement by the father. Her claim is imperfect, to be sure, but it is in the nature of money laid out and expended for the use of the father. *State* v. *Ellis*, 34 N. C., 264.

The child is also interested, as it is for its support that the proceedings are instituted. It is not intended by nature, nor is it tolerated by the law, that men should cast their offsprings upon the world, with all the disadvantages of caste and color, and leave them to perish, or else to be supported by the public.

There is another sense in which the mother is interested. The proceeding in its incipiency is against
(231) her; she is arrested and brought before the magistrate, and if she does not declare the father, she is compelled to pay a fine or go to jail, to be discharged only upon her declaring the father or giving bond.

This, then, is a civil proceeding in which a colored person is interested, and therefore the mother is a competent witness, under the Act of 10th March, 1866.

This opinion will be certified to the Superior Court, that a *procedendo* may issue to the County Court, to proceed in the case according to law.

PER CURIAM. Judgment reversed.

STATE v. GREEN HODGES.

For a conviction of rape, since the passage of the act of 1860-'61, ch. 30, it is sufficient that the fact of penetration be established; and it is not required, to establish such fact, that the witness should use any particular form of words.

RAPE, tried before *Buxton, J.*, at Fall Term, 1866, of the Superior Court of Mecklenburg.

The prosecutrix, who was a widow advanced in life, testified that the prisoner pursued her, seized her by the throat, threw her down and "acted with her as a man acts with his wife," and that he had "full connection" with her. The prisoner was a person of color. His counsel insisted to the jury that there was no sufficient proof of the fact of penetration, and asked the court to charge that such fact "must be directly and specifically proved, and could not be inferentially gathered from the evidence." The court refused so to charge, and the prisoner excepted.

(232) Verdict, Guilty. Rule for new trial. Rule discharged. Judgment, and appeal.

Attorney-General, for the State.
No counsel for the prisoner.

BATTLE, J. It was decided by this court, in the case of the *State* v. *Gray*, 53 N. C., 170, that in an indictment under the Rev. Code, chap. 34, sec. 5, for carnally knowing and abusing an infant female under the age of ten years, there must be proof of the emission of seed, as well as of penetration, in order to convict the offender. Immediately after that decision, and probably in consequence of it, the Act of 1860–'61, chap. 30, was passed, to change the rule of evidence in all cases of rape by providing that it shall not be necessary to prove the actual emission of seed in order to constitute a carnal knowledge, but that the carnal knowledge shall be deemed complete upon the proof of penetration only.

The counsel for the prisoner contended on the trial in the court below that the testimony introduced on the part of the State was insufficient to prove the fact of penetration, for the reason that such fact must be directly and specifically proved, and could not be inferentially gathered from the evidence."

It is not necessary for us to decide whether this proposition is correct or not, because we hold that if the prosecutrix were believed, she proved the penetration positively and unequivocally. The law did not require that she should use any particular form of words in stating that the prisoner had penetrated her body. Words are but the signs of ideas, and it is well known that the same idea may be communicated to a hearer in a variety of forms of expression. The language used by the prosecutrix was, as it seems to us, intended to convey to the jury that the prisoner had had a (233) complete carnal knowledge of her body, which, of course, included penetration, and the jury must have so understood her. The question was fairly submitted to them by the court, and the prisoner has no just cause of complaint against their verdict.

Having examined the record and found no error in it, we direct that it be so certified to the Superior Court of law for the county of Mecklenburg.

PER CURIAM. There is no error.

STATE v. JOHN FULKERSON and SQUIRE BUTNER.

1. If one lay poison for another, and he or a third person take it and death result, it is murder, both in the principal and accessories before the fact.
2. Where the Judge charged the jury, that they must "render a fair and honest verdict. If they had a reasonable doubt as to the guilt of the prisoners, it was their duty, under the obligations which they had taken, to render a verdict accordingly; but if they were satisfied beyond a reasonable doubt, upon the law and evidence, that the prisoners were guilty, and from any false sympathy rendered a verdict of not guilty, that the law said they were perjured men:" *Held*, that it was not error.
3. It is not error for the Judge, after he has once charged the jury, and they have retired and failed to agree, in proceeding to give further instructions, to refuse to permit more to be said in behalf of the prisoners or the State; though it may be restrictive of our indulgent practice in capital trials.

MURDER, tried before *Fowle, J.*, at Fall Term, 1866, of the Superior Court of Forsyth.

The points in the case sufficiently appear from the opinion.

Attorney-General, for the State.
Gilmer and *T. J. Wilson*, for the prisoners.

READE, J. It was admitted that the deceased, Annie Grunet, came to her death by poison prepared by Jane Grunet, for the purpose of killing Mrs. Grunet, (234) the step-mother of Annie; and that the poisoned soup which Jane made for Mrs. Grunet was taken by Annie; and there was evidence tending to show that the prisoners were accessories before the fact. His Honor charged the jury that they must be satisfied that the prisoners knew of Jane's purpose to poison Mrs. Grunet, and that they aided, abetted, counselled or encouraged Jane in her purpose.

There can be no doubt that, if A lay poison for B, and he or another take it, and death result, it is murder, both in the principal and accessories before the fact. Arch. Cr. Pl., 216.

There were two objections mainly relied on in this court for the prisoners.

1. That the Judge intimated his opinion upon the facts against the prisoners in this:

"The court then said, that every trial which involved the life of a human being was a matter in which every man, woman and child in the county and State had a direct interest. That our whole people were interested in the proper administration of justice, and that it was their duty to try this case by the law and the evidence, and render a fair and honest verdict. That if they had a reasonable doubt as to the guilt of the prisoners, or either of them, it was their duty, under the obligations which they had taken, to render a verdict accordingly; but if they were satisfied beyond a reasonable doubt upon the law and evidence, that the prisoners, or either of them, were guilty, and from any false sympathy rendered a verdict of not guilty, that the law said they were perjured men."

It is not stated that there was anything in the manner or emphasis of the charge against the prisoners; and the language itself does not indicate any leaning or bias. We must therefore take it that there was nothing in the manner of the Judge to give any peculiar character to his charge. Indeed, it is so grave an error in a Judge to invade the province of the jury, (235) that we do not feel at liberty to strain his language in order to find a fault. Yet, when the error is apparent, the consequence may be fatal to the prisoner, and we do not hesitate to correct it. It is true his Honor did not charge, in so many words, that if they convicted from prejudice it would be perjury, as much as if they acquitted from sympathy; but he did charge them that they must render a fair and honest verdict, and that if they had a reasonable doubt as to the guilt of the prisoners, it was their duty, under the obligation which they had taken, to render a verdict accordingly. The jury must have understood from this, that it would be contrary to their obligation, and therefore perjury, to find falsely either way, and as much one way as the other.

2. That the proceedings were irregular, to the prejudice of the prisoners, in this:

After the jury had been charged with the case for a considerable time, they desired to appear before the Judge in court. The Judge sent for the counsel on both sides at his chambers, and informed them that the jury had sent for him, and that he preferred that they should say nothing before the jury; but if they had any instructions to ask he would hear them then. The counsel on both sides asked for instructions. They then went into the court-house, and the jury came in. The Judge then remarked from the bench that he would hear nothing from the prisoners or the State at that stage of the proceedings; that the case was then between him and the jury. He then asked the jury what they had to say, and they replied, "Nothing, except that we can not agree." He then informed the jury that the prisoners had requested him to give them certain instructions, which he stated but declined to give, and proceeded to give instructions different from what the prisoners desired. The instructions given were right in themselves, and the instructions asked for were wrong.

(236) We have considered this part of the case with unusual care, and we are unable to see that, in any reasonable probability, injury resulted to the prisoners; and therefore, we can not disturb the verdict. But it is the first time we have been called upon to review a trial conducted after this manner. And the fact that it is new is against it. It was doubtless intended to correct an evil which is alleged to exist to some extent, *i. e.*, that counsel sometimes seek an unfair advantage by some suggestion or argument to the Judge, which is really intended for the jury. The mere order or manner of conducting a trial must be almost entirely at the discretion of the Judge who holds the court. He may permit or refuse a witness to be recalled; he may allow evidence at any stage of the trial, and so he may charge or recharge the jury, and may undoubtedly

allow, or refuse to allow, the interposition of counsel after the argument has been closed. But still it strikes us as somewhat restrictive of our hitherto indulgent practice to say to a prisoner, whose life is at stake, that though there may be error in the charge, yet no suggestion will be heard, however respectful, in the hearing of the jury. Our theory is, that counsel on both sides are in aid of the court and jury in arriving at the truth as to both law and fact. It is in contravention of that theory, as we hope it is of the practice of the profession, to suppose that they will capriciously interfere to embarrass the administration of justice.

And it is suggested whether it were not better to visit with prompt and inexorable punishment mal-practice, if it occur, than to seem to abridge our indulgent practice in *favorem vitœ.*

There is no error in the record. This opinion must be certified to the court below, that judgment and execution may be awarded.

PER CURIAM. There is no error.

(237)

STATE v. ALBERT WILSON.

1. Although no bill of exceptions be filed, and it do not appear that there was any motion in arrest of judgment, the Supreme Court will examine the record to see whether there be error.
2. An indictment, charging that the defendant and another "did commit an affray, by fighting together by mutual and common consent, in public view," includes a charge of a mutual assault and battery, and the defendant may be convicted under it, though the grand jury endorsed not a true bill as to the other.

(*State v. Allen*, 11 N. C., 358, cited and approved; *State v. Woody*, 47 N. C., 335, cited, distinguished and approved.)

AFFRAY, tried before *Mitchell*, *J.*, at Fall Term, 1866, of the Superior Court of Watauga.

The facts are sufficiently set forth in the opinion.

Attorney-General, for the State.
No counsel for the defendant.

BATTLE, J. This case is brought before us by the appeal of the defendant, who was convicted upon an indictment, which charged that he and one Samuel Tribet "did commit an affray, by fighting together by mutual and common consent, in public view, contrary to the peace and dignity of the State." No bill of exceptions has been filed, and the record does not show that there was any motion to arrest the judgment. It is our duty, nevertheless, to examine the record to see whether there is any error in it. We discover that the grand jury found the bill "true" as to the defendant Wilson alone; and we presume that the defendant contends that he can not be convicted and sentenced alone for an affray, because that is the fighting of two or more persons in a public place, to the terror of the citizens. The argument might avail him if it were not established by authority that such an indictment for an affray includes (238) a charge of a mutual assault and battery, under which one of the parties may be convicted, while the other is found not guilty. *State* v. *Allen*, 11 N. C., 358, is the case of an indictment substantially the same with the present, and the decision in that case must prevail in this. Had the bill of indictment simply charged the parties with making an affray, without stating in what manner or by what acts, it would have been defective. *State* v. *Woody*, 47 N. C., 335. But here, after the action of the grand jury, the indictment was in legal effect one for an assault and battery, and the defendant was properly found guilty and sentenced to pay a fine under it. The judgment must be affirmed.

PER CURIAM. There is no error.

Cited: State v. *Brown*, 82 N. C., 589; *State* v. *Harbison*, 94 N. C., 887; *State* v. *Lachman*, 98 N. C., 765; *State* v. *Watkins*, 101 N. C., 704; *State* v. *Griffin*, 125 N. C., 694.

Doe on the Demise of I. B. MORRIS and wife v. C. M. AVERY.

Where a party to a suit had died in June, 1864: *Held*, that under the ordinance of the Convention of 23d June, 1866, providing that the time which had elapsed since September 1, 1861, should not be counted for the purpose of barring actions or presuming the abandonment or satisfaction of rights, a judgment given at Fall Term, 1866, that such suit had abated, was erroneous.

(*Neely v. Craige, ante*, 187, cited and approved.)

EJECTMENT, commenced in the Superior Court of Burke County at Fall Term, 1857. The defendant, Col. C. M. Avery, was killed in battle in June, 1864, and at Fall Term, 1867, of the Superior Court of McDowell, whither the suit had been removed, his Honor, *Mitchell, J.*, on motion by the counsel for the defendant, adjudged that as two terms of the court had elapsed since the death of the defendant, the suit had abated.

From this judgment the plaintiff appealed.

(239) No counsel for the plaintiff.

Logan and *Avery*, for the defendant.

BATTLE, J. Our statute (Rev. Code, chap. 1, sec. 1), provides that no suit shall abate by reason of the death of either party: "*Provided, however*, that application be made to the court wherein the process is pending within two regular terms of the court after such death."

The case before us states that "two terms of the court had been held" after the death of the defendant; and therefore his Honor held that the suit abated.

The ordinance of the Convention, entitled "An ordinance to change the jurisdiction of the courts," section 20 (passed 23d June, 1866), provides "that all acts and parts of acts suspending the statutes of limitation in the Revised Code are hereby repealed, except as herein provided: *Provided*, that the time elapsed since 1st September, 1861, barring actions or suits, or presuming the abandonment or satisfaction of rights, shall not be counted."

This ordinance prevents the suit from abating. It confers no new rights, but it preserves existing ones. See the case of *Neely* v. *Craige*, *ante*, 187, in which this ordinance and the Acts of February, 1863, and of 1866 are construed.

PER CURIAM. There is error.

Cited: *Hinton* v. *Hinton*, *post*, 414; *Den* v. *Love*, *post*, 436; *Johnson* v. *Winslow*, 63 N. C., 553; *Donoho* v. *Patterson*, 70 N. C., 656; *Benbow* v. *Robbins*, 71 N. C., 339; *Pearsall* v. *Kenan*, 79 N. C., 474.

(240)

WILLIAM P. LITTLE v. JAMES MARTIN and others.

Where upon *recordari* in the Superior Court it appears that the proceedings in an inquisition of forcible entry and detainer before a justice of the peace were regular, and the jury found that the relators had an estate in fee simple in the land and were forcibly ejected by the defendant, the writ should be dismissed.

(*State v. Nations*, 23 N. C., 325, cited and approved.)

RECORDARI, removing the proceedings in an inquisition of forcible entry and detainer before a justice of the peace to the Superior Court of Mecklenburg, and heard before *French*, *J.*, upon a motion to dismiss, at Fall Term, 1860. His Honor refused to dismiss and ordered the cause to be placed upon the trial docket for trial by jury. The defendants appealed.

The defendants in the *recordari*, as the school committee for a certain district in Mecklenburg County, had instituted proceedings against the plaintiff for the forcible entry and detainer of a school house, to which they claimed title. The jury found that the defendants were seized in fee of the house, and that the plaintiff did forcibly enter and detain the same; and the justice issued a writ of restitution. Thereupon the plaintiff exhibited a petition to his Honor, *Heath*, *J.*, in November, 1859, praying for writs of *recordari* and *supersedeas*, which were granted, returnable to Spring Term, 1860.

The petition set forth that the plaintiff had purchased the land upon which the school house was built from one having title before the date of the purchase by the committee, and that the conveyance to the committee was for other reasons invalid; but that, "notwithstanding the clear evidence of title in him," the jury rendered a verdict against him. No other ground for the writs was stated.

J. H. Wilson and *Boyden*, for the plaintiff.
Vance, for the defendants.

(241) BATTLE, J. We are clearly of opinion that his Honor in the court below erred in ordering the cause "to be placed upon the trial docket for trial by jury." The plaintiff in the *recordari* was not, under the circumstances, entitled to a trial by jury in court.

At the inquisition taken before the justice, he entered a plea by which he traversed the force charged against him, and also the alleged title of the relators, and the verdict upon both points of his traverse was found against him. After such a finding, the only remedy open to him in that proceeding was to take the case to the Superior Court by a writ of *recordari*, and object if he could that there was some "misconduct or irregularity in the justice in receiving improper testimony, or refusing proper testimony, or otherwise." *State upon the relation of Sherrill* v. *Nations*, 23 N. C., 325. Here, the plaintiff in the *recordari* does not set forth in his petition any instance of misconduct or irregularity committed by the justice, but in it that the jury found a wrong verdict upon the evidence submitted to them: and that in truth he had the better title to the land, and was not guilty of the force complained of. His object in suing out the writ of *recordari* is manifestly to obtain a new trial in court of the issue which has been found against him. Upon this question the case of *State* v. *Nations*, above referred to, is directly in point.

It is there said that "if the defendant have notice and the traverse jury find the force, and the proceedings are regular, or if the defendant decline to traverse, he must restore the possession if the relator be tenant for years, or has a greater estate in the land. If the defendant have any title he must bring his action of ejectment, and obtain possession in a peaceable manner." In the present case the proceedings before the justice were regular, and as the jury found that the relators had an estate in fee simple in the land from which they (242) were forcibly ejected by the defendant, his writ of *recordari* ought to have been dismissed from the Superior Court, instead of being placed upon the trial docket.

PER CURIAM. Order reversed.

STATE v. WILLIAM BLALOCK and others.

1. The Supreme Court will look into the merits of a prosecution coming within the scope of the act of December, 1866, entitled "An act granting a general amnesty and pardon of all officers and soldiers," etc., so far as to ascertain whether the defendants are clearly entitled to an acquittal. If so entitled a new trial will be granted that they may save costs; it will not be granted if their innocence is doubtful.
2. By READE, J., the distinction between pardon and amnesty discussed and stated. A pardon is granted, usually, by the executive, to one who is guilty, either before or after conviction; amnesty, by the Legislature, to those who may be guilty, generally in classes, and before trial.
3. The act of December, 1866, includes both amnesty and pardon, and the court will place a liberal construction upon its terms, that its benefits may be extended to as many as possible.

AFFRAY, tried before *Mitchell, J.*, at Fall Term, 1866, of the Superior Court of Caldwell.

The four defendants convicted in this case, together with twelve others, had been indicted for unlawfully assembling together and committing an affray.

All of the original defendants were citizens of the State, and all, with the exception of one Jesse Moore, claimed to be enlisted soldiers in the Federal service. Jesse Moore and four others, who were members of the home guard organization of the State, were assembled at the house of one Carroll Moore, in Caldwell County, on the night of the 7th January, 1865. Early the (243) next morning the defendant Blalock, with a squad of men, who were some of the original defendants, approached the house armed, and, upon an attempt on the part of Jesse Moore and those with him to escape with guns in their hands, fired upon them and ordered them to halt and surrender. The fire was returned and Jesse Moore and Blalock were wounded.

There was evidence that Blalock had been a Federal soldier for some time, and that the others, about a month before this occurrence, had attempted to reach the Federal lines; that while on their way they met one Davis, who claimed to be a major in the Federal service and a recruiting officer, and upon his proposing that they should enlist as soldiers they took the oath usual upon enlistment and received at his hands one and a half days' rations. Failing to reach the lines, they returned to their homes. A witness testified that he had seen Davis with the army in Tennessee, and that he was acting as a recruiting officer.

It was further in evidence that one Hartley, a lieutenant in the Federal service, ordered Blalock to take a squad of men and capture the home guards at Carroll Moore's; also that the defendants subsequently received clothing and rations as Federal soldiers.

His Honor charged that if the defendants had never been connected, or done duty with the Federal army, the mere fact of taking the oath before Davis and receiving one and a half days' rations would not justify the affray, although Hartley had authority to command a squad of Federal soldiers and gave the order for the capture of the home guards at Carroll Moore's. Prisoners excepted.

Verdict guilty. Judgment, and appeal.

Attorney-General, for the State.
Folk and *Blackmer & McCorkle*, for the defendant.

(244) READE, J. There were eighteen persons indicted in this case. They were citizens of North Carolina, and during the war they enlisted in the Federal service and engaged in a fight with arms with certain of the home guards in the Confederate service; and some were wounded on both sides.

Several interesting questions were discussed at the bar as to the regularity of the enlistment, and of swearing and mustering in of the defendants, involving the general question, Whether they were soldiers in the Federal service at all; and if they were, then, whether they were acting under orders or were marauders.

But we are relieved from deciding these complex and embarrassing questions by reason of the fact that since the trial below, the Legislature has passed an act of amnesty and pardon, which embraces this case. We did, indeed, so far consider the facts as to enable us to determine that the defendants are not clearly entitled to an acquittal upon the merits; because if they are they would be entitled to a new trial to save the costs. But is is evident that their guilt or innocence is involved in much doubt, and we can see no good likely to result from another trial.

The conflict of arms and political disturbances through which we have passed have troubled society to its deep foundations. Those who are now neighbors have lately been in armed hostility, and met each other with deadly purpose; property and lives have been sacrificed; those who were in command had to compel obedience, and were sometimes too imperious; those who had to serve were worn out and irritable, and sometimes resistant; the rapacious plundered and the innocent suffered. Every one has something unpleasant to remember, and many have wrongs to revenge. Criminal prosecutions and civil suits necessarily spring out of such a past. The details, not to say the exaggerations of irritating facts, the conflict of witnesses, the discussions between zealous advocates, the denunciations of parties, the (245) hazard of costs and damages, and the inflictions of punishments, would not only keep alive these evils, but would cause them to spread into a pestilence. While so many have injuries to revenge, quite as many have errors to regret; and it will be a great public good if the past can be forgiven and forgotten. In view of this the Legislature, at its present session, passed the following act:

Be it enacted by the General Assembly of the State of North Carolina, and it is hereby enacted by the authority of the same. That no persons who may have been in the civil or military service of the State, as officers or soldiers of the militia, or soldiers of the home guard, officers and soldiers of the local police, officers and soldiers of the late Confederate States, or as officers and soldiers of the United States, shall be held to answer on any indictment, for any act done in the discharge of any duties imposed on them, purporting to be by a law of the State or late Confederate States Government, or by virtue of any order emanating from any officer commissioned or non-commissioned of the late Confederate States Government, or any officer commissioned or non-commissioned of the United States Government. That no one of the above-named officers or privates who now are or may hereafter be indicted for any homicides, felonies or misdemeanors committed prior to the 1st day of January, A. D. 1866, shall be held to answer for the same, but shall be entitled to a full and complete amnesty, pardon and discharge from the same, upon the payment of the costs: *Provided*, they shall not be taxed with the payment of the costs upon any indictment preferred against them from and after the passage of this bill, or in other words, that no officers or privates in any of the above-named organizations, against whom no indictment is now pending, shall be liable to prosecution for any offence committed against the criminal (246) laws of North Carolina prior to the 1st day of January, A. D. 1866, as aforesaid.

Be it further enacted, That in all cases where indictments are now pending, either in the County or Superior Courts, if the defendant can show that he was an officer or private in either of the above-named organizations at the time, it shall be presumed that he acted under orders, until the contrary shall be made to appear.

Be it further enacted, That all private citizens, who on account of age, or from any other cause, were exempt from service in any or all of the above-named organizations, who, for the preservation of their lives or property, or for the protection of their families, associated themselves together for the preservation of law and order, in their respective counties or districts, shall be entitled to all the benefits and provisions of this act.

Be it further enacted, That no person who may have been in the civil or military service of the State or late Confederate States Government, or in the service of the United States Government, in either of the above-named organizations, shall be held liable in any civil action for any act done in the discharge of any duties imposed upon him by any law or authority purporting to be a law of the State or late Confederate States Government.

Be it further enacted, That this act shall be in force from and after its ratification.

Legislation of this kind has not been unfrequent, when occasions of great strife have made it proper. It is generally applied to whole classes for the purpose of restoring tranquility in the State. It is the gracious act of the government towards its erring subjects. It is the most amiable prerogative of the government. Law can not be formed on principles of compassion to guilt. The rugged task of condemning and punishing is for (247) the courts. The gracious act of forgiving is for the crown. 4 Black, 401.

Pardon and amnesty are not precisely the same. A pardon is granted to one who is certainly guilty, sometimes before, but usually after conviction. And the court takes no notice of it, unless pleaded, or in some way claimed by the person pardoned; and it is usually granted by the crown or by the executive. But amnesty is to those who may be guilty, and is usually granted by Parliament, or the Legislature; and to whole classes, before trial. Amnesty is the abolition or oblivion of the offence; pardon is its forgiveness. The act under consideration is both. It is most beneficially intended, as it is well calculated to lull strife to sleep. It embraces all who may be supposed to have committed crimes or injuries by reason of their connection with the late war, whether they were officers or privates, whether they were of the Federal or Confederate forces, and whether they have been convicted or not. The propriety of embracing those of both armies is apparent from the facts of this case. Those who were engaged in the fight were neighbors and must meet each other, and live together either in oblivion and forgiveness of the past, or in hatred and strife. And, besides, it is to be expected, as it is desirable, that those of the opposing sections who are not now neighbors, will, in many instances, become so by removals; and the intercourse of a common people, and the duties of a common government will often throw them together.

If there were doubts whether the act embraces these defendants by reason of any technical defects in their enlistment into service, we should still be inclined to give them its benefits, as acts of grace are to be construed liberally in favor of the subjects, it being the highest respect to the government to suppose that its most amiable prerogative is not exercised sparingly. And it will tend much to induce repose in the (248) public mind, that liabilities for war-crimes and redress for war-injuries are not to be thought of, and need not be discussed either in private or public. Ordinarily, a pardon must be pleaded at the trial or claimed after conviction, and a failure to do so is a waiver of its benefits. But a general act of amnesty and pardon must be taken notice of by the courts like any other public law. It can not even be waived by the persons embraced.

This opinion must be certified to the court below, to the end that the defendants may be discharged, upon the payment of costs.

We perceive no error in the record.

PER CURIAM. There is no error.

Cited: *State* v. *Cook*, *post*, 536; *State* v. *Keith*, 63 N. C., 143; *State* v. *Shelton*, 65 N. C., 297; *Franklin* v. *Vannoy*, 66 N. C., 151; *State* v. *Haney*, 67 N. C., 468; *State* v. *Buck*, 73 N. C., 268.

RULES

ADOPTED BY THE

SUPREME COURT

AT JANUARY TERM, 1867.

In any argument before this court, the counsel will hereafter file a brief containing the different points which he makes, and the names of the cases and authorities upon which he relies in support of each point.

EXAMINATION FOR LICENSE.

The Judges of the Supreme Court will hereafter require that applicants for license shall be prepared to stand an approved examination upon the following works:

FOR THE COUNTY COURT.

First, second and fourth Books of Blackstone's Commentaries; Coke upon Littleton or Cruise's Digest; Fearne on Remainders and Executory Devises; Williams or Iredell, on Executors; Revised Code—Chapters on Deeds, Descents, Widows, and Wills.

FOR THE SUPERIOR COURT.

Third Book of Blackstone's Commentaries; first volume of Chitty on Pleading; Stephen on Pleading; Adams's Doctrine of Equity; Smith on Contracts; Phillips or Greenleaf on Evidence; Revised Code—Chapters on County and Superior Courts, Crimes, and Executors.

CASES AT LAW
ARGUED AND DETERMINED IN THE
SUPREME COURT
OF
NORTH CAROLINA.
AT RALEIGH.

JUNE TERM, 1867.

EDWARD WOOD, and others, v. LEMUEL SAWYER, and others.

1. Certain letters of a testamentary character, written and signed by the testator, dealing with property contained in the principal paper propounded, and referred to therein as giving further directions, having been rejected from probate: *Held*, that such rejection did not, in the view of a court of probate, render such principal paper "unfinished," and void.
2. When a paper-writing, purporting to be a will, and executed with the requisite formalities by a person competent to make a will, is offered for probate, it must be established without regard to the construction of its contents, and without consideration of trusts declared therein, or resulting to the heir.
3. Upon ambiguities in the statement sent up to this court, the presumption will be against the appellant.
4. To support an allegation of partial insanity, evidence of strangeness of conduct towards a particular person had been introduced by the caveators: *Held*, to be competent for the propounders to show similar conduct towards other persons.
5. The contents of a paper written by dictation of the testator about two years after he had executed his will, assigning reasons for the particular dispositions of such will: *Held*, to be competent upon the question of the testator's capacity.
6. In support of an expert's opinion upon a question of insanity, it is not competent for him to repeat an account which he had received from a monomaniac as to the development of his own disease; or another account related to him by an unprofessional nurse of another insane person.

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7. The testator, having in his lifetime referred to a certain book as having been printed at his own expense, and as giving a correct account of his family, a genealogical table therein is competent evidence of the state of his family at his death.

8. The course and practice of the Court as to the order in which testimony is to be introduced is well settled, and ought not to be violated, except in cases of surprise or mistake as to matters seriously affecting the merits of a cause.
9. Proof of the transaction of ordinary business, not connected with the matter in regard to which delusion exists, is some evidence to rebut a presumption raised by proof that such delusion existed a short while before; whether sufficient or not, is a matter solely for the jury.

(*Whitfield v. Hurst*, 31 N. C., 170; *Redmond v. Collins*, 15 N. C., 430, cited and approved.)

Caveat, tried before *Merrimon, J.*, at a term of the Superior Court of Chowan, specially appointed for that purpose, begun at Edenton upon Wednesday the 6th day of February last and continued under special acts of the Assembly for four weeks.

The paper-writing was as follows:

"I, James C. Johnston, resident in Chowan County, State of North Carolina, make this my last will and testament, in manner following, to-wit: I give, devise and bequeath to my friend, Mr. Edward Wood, resident of Chowan County, and State of North Carolina, all my estate, both real and personal, of what nature or kind soever that I have in the county of Chowan at the time of my death, including the mills, houses and lots and negroes now in the possession of Mr. John Thompson, and for which he has a lease not transferable to any person; so also with regard to the plantation on which G. J. Cherry lives, for which he has a lease, not transferable to any other person—to him, the said Wood, his heirs and assigns forever, subject to such disposition and instructions which I shall make in a private letter directed to him, and which he will find with this will, trusting entirely to his honor and integrity to fulfil them as far as circumstances and his convenience and (253) the means and funds in his hands will permit. I give also to the aforsaid Edward Wood all the money he may find at my death, all my shares of bank stock in whatever State they may be located, United States stock or loans, North Carolina State stock, Virginia State stock, and any stock of whatsoever kind soever of which I may die possessed, all bonds and notes of individuals, and balance of accounts due me. I hereby appoint my said friend, Edward Wood, my sole executor of my estate of unsettled business in the county of Chowan, without interfering or being interfered with by my other executors, mentioned in this will, except by advice, and to be entirely free from any claims except my debts, if any, in the county of Chowan, and my funeral expenses. If any of my relatives should undertake to prevent the establishment of this my last will and testament, then it is my wish that they should be entirely cut off and deprived of any provisions I may make for them or him in the private letter I leave for my executor, Edward Wood, in whom I have entire confidence to do them justice, according to my instructions contained in that letter, which I wish him to keep entirely private until he finds it perfectly convenient to meet my instructions.

"Secondly, I give, devise and bequeath to my friend, Mr. C. W. Hollowell, resident in Pasquotank County, State of North Carolina, for his great exertions in protecting and taking care of my property in that county, all my estate, both real and personal, of what nature or kind soever in the county of Pasquotank, to him, his heirs and assigns forever, subject only to the instructions I may give in a private letter I shall write him, and will be found with this, my last will. Having full confidence in his honor and integrity to fulfil the instructions in that letter, which is my wish should be kept entirely secret, until it is perfectly convenient for him to fulfil the instructions therein contained, being governed by the circumstances of the times and
(254) the funds and means he may have in hand of
mine. I also give Mr. C. W. Hollowell all the money, or funds, I may have in his hands, after paying any debts I may owe in the county of Pasquotank at the time of my death, and I do hereby appoint my friend, C. W. Hollowell, my sole executor of all my estate, and settle all my business in the county of Pasquotank,

without interfering, or being interfered with, by the other executors appointed to settle my business in other counties. If any of my relatives should endeavor to prevent this, my last will and testament, from being established, it is my wish that they, or him, be entirely cut off and deprived of any provision I shall make for them, or him, in the private letter I shall leave for my executor, C. W. Hollowell.

"Thirdly, I give, devise and bequeath to my friend and faithful agent, Henry J. Futrill (for his fidelity and good management in taking care of and protecting my property in the counties of Halifax and Northampton), all my estate, both real and personal, of what nature and kind soever, in the counties of Halifax and Northampton, to him, his heirs and assigns forever, subject only to the instructions and provisions I shall make in a private letter directed to him, and which will be found with this, my last will and testament. I also give to Henry J. Futrill all the money and notes, or bonds, or accounts due me, which he may have in his hands, after paying any debts I may owe in the said counties of Halifax and Northampton; and I do hereby appoint the aforesaid Henry J. Futrill my sole executor of all my estate, and to settle all my business in the counties of Halifax and Northampton, not to interfere or be interfered with, by my other executors, named and appointed by the will to act in other counties; and it is my wish, that if any of my relatives should think proper to dispute or prevent the establishment of this, my last will and testament, that they, or him, shall be (255) entirely cut off and deprived of all provision I may have made for them, in the private letter directed to Mr. Henry J. Futrill, in whose integrity and honor I have entire confidence to do justice, according to my instructions in that letter, and according to the circumstances of the times and the means and funds he may have in his hands of mine, which letter to Mr. Futrill I wish him to keep entirely secret until it is perfectly convenient to carry out my instructions.

JA. C. JOHNSTON. [Seal.]

"Thus, after cool, calm and mature deliberation and reflection, I have made this my last will and testament, in these times of revolution and anarchy, when I know not what a day may bring forth, and when I do not know whether I shall be worth half or any part of the estate I now possess, when I die, for which reason I have made no specific legacies or devises, but rely entirely on the integrity, fidelity and moral sense of my executors, appointed by this will, to carry out my intentions and instructions contained in the private letters directed to each of them separately, written by my own hand, and enclosed in the same envelope with this will, freeing them from legal restraint, restrictions or exactions, to which I do not wish them to be subjected; and further, if any person or persons who may have any expectations from me, shall think proper to dispute this will, or attempt to prevent it from being duly established, I request and direct my executors to cut them off and deprive them of any legacy or provision I may make for them, or him, in the private letters of instruction I have left for my executors, appointed by the will.

"All my life has been devoted to cultivating and improving my farms in Halifax, Northampton, Pasquotank and Chowan counties, that they may be continued in the same progress of improvement, and that my negroes may be taken care of, and that my real and personal (256) estate may not be divided and scattered to the four winds of heaven, and, perhaps, brought under the hammer of the auctioneer or sheriff for a division, I have placed them in the hands of persons whom I know to be men of energy, honor and integrity. Though none of them are connected with me by blood, marriage or otherwise, I have a high respect for them for moral worth and great energy to carry out my wishes and instructions contained in my private letters to them. I now make and publish this, my last will and testament, written by my own hand, to be construed literally as to my errors in writing, of omissions or informality. Hereby revoking all former wills by me made at any time heretofore. The word G. J. Cherry interlined in the 13th line in page 1st, the word winds interlined in the 4th line on page 6th, were made before the signing, sealing and publishing of this will.

"In witness whereof, I hereunto set my hand and seal, this tenth day of April, in the year of our Lord one thousand eight hundred and sixty-three (1863), April 10th.

"JA. C. JOHNSTON. [Seal.]

"Signed, sealed and published in presence of—

"J. E. NORFLEET,
"H. A. SKINNER,
"J. R. B. HATHAWAY.

"The foregoing instrument of writing, purporting to be the will and testament of James C. Johnston, was duly acknowledged and confirmed by him in my presence, this 30th day of June, 1863.

"WM. J. NORFLEET.

"That the annexed will may not be thought to be made under sudden impulse and excitement, I, this day, 12th of September, 1863, acknowledge and (257) confirm it, not wishing any alteration whatever to be made therein. Witness my hand and seal, 12th September, 1863.

"JA. C. JOHNSTON. [Seal.]

"Test: TH. S. SUMMERELL,
"WM. R. SKINNER."

This paper having been propounded for probate at May Term, 1866, of Chowan County Court, upon its being suggested to the court that certain letters in said script referred to constituted part of said will, and that the next of kin of the testator had a right to inspect them before electing to caveat, etc., they were exhibited and propounded as parts of said will.

The first of these letters was dated "April, 1863," and directed to Edward Wood; the second was dated "11th April, 1863," and addressed to C. W. Hollowell: the third was dated "12th April, 1863," and addressed to Henry J. Futrill. They all contained directions in regard to portions of the property included in the will—distributing gifts and making dispositions as regards favorite slaves, etc., etc. Each was subscribed by the testator, but neither was attached.

The issue submitted was, "Is the said paper-writing, or any part thereof, and if so, what part, the last will and testament of the said James C. Johnston, or not."

Upon the trial in the Superior Court the caveators excepted to the following rulings of his Honor:

1. The propounders proposed to ask a witness if the testator's habit, after becoming offended with any one, was not to treat such person with coolness, and to refuse to quarrel with him. This was offered to explain strangeness of conduct and coolness towards a person with whom the testator had been on terms of friendship, but had afterwards become offended.

(258) This evidence the court admitted.

2. The propounders offered a paper which a witness, one G. J. Cherry, said he had written in the presence of the testator, at his dictation, and then had read over to him, and heard him approve of as being correct. This paper gave reasons for the dispositions contained in the will, and was offered to show the testator's state of mind. It had subsequently been read by one James E. Norfleet to the testator, and again approved of by him.

This was admitted by the court.

3. The caveators proposed to ask of a medical expert what were the facts attending the first development of a case of monomania which he had attended in its later stages—he having no personal knowledge of these facts, but having heard them related by a sister of the patient; they also proposed to ask such expert what was the history, and what his opinion of another case of monomania, the facts of which he had received only from the patient.

The propounders objected, and the court excluded the testimony.

4. It was in evidence that the testator had said of one of the caveators that he was a gambler. The caveators proposed to prove that this person's general character was good, and that he was not a gambler.

The court ruled that at this stage of the trial (the caveators having rested their case, and the propounders having subsequently introduced witnesses), the caveators could only introduce evidence to impeach witnesses introduced by the propounders after the caveators had rested their case, and for the purpose of sustaining such of the caveators' witnesses as had been attacked by the propounders—by way of rebutting and strengthening evidence; and that, at all events, the admission of such evidence then was matter of discretion. The court therefore declined to receive the evidence proposed.

(259) 5. The propounders offered to read an extract from a book entitled "Life and correspondence of James Iredell, one of the Associate Justices," etc., etc. —which extracts purported to give a genealogical table of the family of the alleged testator. Much evidence had been offered during the trial to show the number of the heirs and next of kin of the testator, in order to prove that if he had made no will, his estate, and especially his slaves, would have been much scattered—which would have violated his humane intentions. It was in evidence that this book was taken from the testator's library, that he had many copies of it, that he had presented copies of it to many gentlemen accompanied with expressions of approbation of it, particularly as containing a correct account of his family, and that he said he had furnished money to publish it.

The court allowed this evidence to be introduced.

6. The court, having instructed the jury that upon the evidence connected with the deposit of the letters to Wood, Hollowell and Futrill, they should find that they were no part of the will—the caveators asked the court to instruct them farther that by the rejection of these letters as part of the alleged will, a trust resulted to the heirs-at-law, in all the property mentioned in the first paragraphs of the several devises and bequests to Wood,

Futrill and Hollowell, which were made subject to the "disposition and instruction" of said letters. That this was so by the law of England. But that the County Courts of the State being courts of probate of wills, both of real and personal estate, and the paragraphs aforesaid in the attested instrument being subject to and dependent upon the private letters, which could not be recognized as part of the will, it was unfinished and void as to those paragraphs, although, if the alleged testator was of sound mind at its execution and re-affirmation, it could be upheld as to the other parts.

The court declined to give this instruction.

(260) 7. The caveators farther asked the court to instruct the jury: That if the alleged delusion had been proved to the satisfaction of the jury to have existed shortly before the execution of the paper, to-wit, on the 7th March, 1863, proof of the transaction of ordinary business, not connected with the subject of the delusion, was not sufficient to rebut the presumption against the paper raised by the proof of delusion as aforesaid.

The court, being of opinion that such instruction would be invading the province of the jury, declined to give it, but told the jury that they must weigh the evidence, and if they believed the caveators had proved the insanity of the alleged testator, then the burden of proving sanity would rest on the propounders, and they would consider of the evidence referred to in this view.

Verdict establishing the will. Rule for a new trial. Rule discharged. Judgment, and appeal.

Graham, *Bragg*, *Vance* and *Eaton*, for the caveators.

1. The paragraphs in the script which are affected by the letters, upon the rejection of the latter should also have been rejected, as "unfinished."

That parts of a script may be established and others rejected. See Wms. Exrs., 209; *Gash* v. *Johnston*, 28 N. C., 289.

On inspection of this script it is manifest that the testator designed in these clauses to have one will for the public, duly attested and to be recorded, and another containing the beneficial dispositions of the property embraced, which should remain a profound secret between him and his executors.

A will must be a consummate act (Swin., 57), and by statute every part must be in writing, attested by two witnesses. Chancery is the only court of probate of wills of real estate in England, if there be any
(261) such court. Cruise Dig., 6, 76, 77; Story Eq. (5th ed.), 1445–'49, and notes; *White* v *Wilson*, 13 Ves., 87, n. (Sumn.); *Paine* v. *Hale*, 18 *ib.*, 475, and notes; *Jackson* v. *Berry*, 2 Cond. Ch., 224–'25; *Harris* v. *Cotterill*, 3 Mer., 678; although no decree in favor of a will is made except after a verdict in a court of law upon an issue of *devisavit vel non.* In chancery the rule is that no paper can be admitted as part of a will unless formally executed, or unless referred to in a formally executed paper as already existing. *Habergham* v. *Vincent*, 2 Ves. Jr., 204; *Smart* v. *Prigeon*, 6 Ves., 560; *Muckleston* v. *Brown*, *ib.*, 67; Redf. Wills, 261–'64 and 266, n.; *In re Lancaster.* To same effect *Chambers* v. *McDaniel*, 28 N. C., 226; also Redf. on Wills, 287; 4 Kent., 531.

The letters are no part of the will, and do not even create a trust which equity will execute. The doctrine in *Cook* v. *Redman*, 37 N. C., 623, and *Thompson* v. *Newlin*, 41 N. C., 380; S. C., 43 N. C., 32, has no application here. There the wills were upon the face perfect, and the court put its interference upon the ground of fraud, the testator having parted with all his interest. Here the testator reserves his interest over the property in question, and, things being in this posture, dies; thereupon that reserved interest descended to his heirs. The testator says that his devises to Wood, etc., are subject to letters to be written in future, *i. e.*, regard being had to the law, "subject to my intention not to dispose of it by will"; in other words, "I intend it for my heirs."

The question is, Shall a declaration of this be made by a Court of Probate, or put off for a Court of Equity? There is no reason why it may not be made here. See analogous doctrine in regard to conditions precedent unperformed, or become impossible. 1 Jarm., 796–'98, 806, 682; *Van Horne* v. *Dorrance*, 2 Dall., 317; *Moakley* v. *Riggs*, 19 John., 71, 72; *Taylor* v. *Bullen*, 6 Cow., 627; 1 Jarm., 23–26. In England the Ecc. Courts will reject a paper purporting to execute a power, if the power be not properly executed, *ib.*, 14, 26, etc. See *Weeks* v. *Malterdet*, 14 East, 568. There can be (262) no reason why our Courts of Probate should blindly set up a will, when its contents show that it can have no effect.

Nor are these devises relieved from an application of this doctrine by the expressions of confidence, etc., contained in the will. These are only customary pledges of affection and confidence, leaving the duties of the agents to be declared by courts, as in ordinary cases; or, supposing that he considered that their honor would be touched by the contents of the letters, now, that these are suppressed, he must be taken to have intended that they should be governed by the rules of law.

2. His Honor erred in not admitting the evidence that one of the caveators was not a gambler. See *Wheeler* v. *Alderson*, 5 Ecc. Rep., 211; 1 Stark. Ev., 386; *Rex* v. *Hilditch*, 24 Com. Law, 330; *Rowe* v. *Brenton*, 3 Man. & Ry., 301; *Brown* v. *Murray*, 21 Com. Law, 431, and note; 3 Chitty's Gen. Pract., 906–'7.

3. (a) Evidence of the testator's habit and manner should not have been admitted to repel the inference of an unsound mind arising from a causeless insult to an unoffending man. *State* v. *Tilley*, 25 N. C., 424; *McRae* v. *Lilly*, 23 N. C., 117; *Jeffries* v. *Harris*, 25 N. C., 105; *State* v. *Barfield*, 30 N. C., 344; *Bottoms* v. *Kent*, 48 N. C., 154. No matter how slight the error, it is ground for a new trial. *Barton* v. *Morphis*, 13 N. C., 520; *Downey* v. *Murphy*, 18 N. C., 82.

(b) An issue like this is a proceeding *in rem* to inform the court, and is not governed by the technical rules of pleading, or of evidence. Strictly, there are no parties, and can be no nonsuit. *St John's Lodge* v. *Callender*, 26 N. C., 335; *Sawyer* v. *Dozier*, 27 N. C., 97; *Benjamin* v. *Teel*, 33 N. C., 49.

4. The memorandum signed by Cherry was improperly admitted. It may be styled an "Irish deposition," a written statement of the evidence of a witness, to which he was not sworn, and to which there was no opportunity for cross-examination, which is forced (263) upon the caveators without their consent. 1 Green. Ev., 439.

5. The statement of the expert should have been admitted. *Melvin* v. *Easley*, 46 N. C., 386, is not in point, yet may be doubted even so far as it goes. See *Bowman* v. *Woods*, 1 Iowa., 441. All agree that the witness may refer to books. *Collier* v. *Simpson*, 24 Com. Law, 219. The matters referred to in this way are not evidence of themselves, but are brought in to test the quality of that which is the only evidence in that connection, viz., the opinion of the expert. See 1 Green. Ev., sec. 440, 3 *ib.*, 416.

6. The extract from the "Life of Iredell" was inadmissible. The date of the book is not given, and therefore the genealogy throws no light upon the state of the family at the death of the testator. It was irrelevant, and calculated to confuse the jury.

7. The instructions asked in reference to the continuance of the monomania should have been given. *Dew* v. *Clark*, 2 Ecc. Rep., 436; *Groom* v. *Thomas*, 4 Ecc. Rep., 181. See Ray's Med. Juris.

Moore, *Smith*, *Winston*, *Heath*, *Gilliam*, *Conigland* and *Phillips & Battle*, *contra*.

1. Indistinctness in the statement of the case can not help the appellants. *Honeycut* v. *Angel*, 20 N. C., 308; *Fleming* v. *Holcombe*, 26 N. C., 268; *Love* v. *Johnston*, 34 N. C., 355; *Fagan* v. *Williamson*, 53 N. C., 433; *Wright* v. *Stowe*, 49 N. C., 516; *State* v. *Jim*, 48 N. C., 348.

2. Courts of Chancery in England are not Courts of

Probate as to wills of real estate. *Jones* v. *Jones*, 3 Mer., 170; *Pemberton* v. *Pemberton*, 13 Ves., 293; *Jones* v. *Frost*, Jac., 217, 1 Jarm., 23, n. (f); Roberts' Princ. of Chan., 211 (L. Lib., 86). Therefore the deduction as to the functions of our County Courts in such (264) matters is unfounded. Courts of Equity, as courts of construction, will administer the trusts attached or implied. *Thompson* v. *Newlin*, 38 N. C., 338, and again 41 N. C., 380; *Brown* v. *Clegg*, 6 Ire. Eq., 90; *Shelton* v. *Shelton*, 58 N. C., 292; *Riggs* v. *Swann*, 59 N. C., 118.

3. The evidence as to the person referred to by the testator as a "gambler" was properly excluded. The case stated by the Judge shows that its admission was a matter of discretion with the court below. *Phila. & T. R. R. Co.* v. *Simpson*, 14 Pet., 462; *Johnston* v. *Jones*, 1 Black., 207.

4. Evidence of the testator's general habit when offended was properly admitted. It being admitted that he was sane as to other persons, evidence that he had treated such persons in the same manner that it was shown by the caveators he had treated persons who were the objects of his supposed monomania—was not only relevant, but important.

5. The paper by Cherry was put in as an act and declaration by the testator, showing capacity and deliberation. *Norwood* v. *Morrow*, 20 N. C., 442: *Oneal* v. *Walter*, 1 Rich., 234; *Halsey* v. *Sensebaugh*, 1 Smith, N. Y., 485; *Russell* v. *Hudson R. R.*, 3 *ib.*, 134; *Love* v. *Johnston* (above).

6. The stories told to the expert by former patients or their friends could not be repeated by him under the circumstances. In some cases, for the purpose of resisting attacks made upon physicians for malpractice, evidence of that sort might be admissible. That is not the case here. See *Biles* v. *Holmes*, 35 N. C., 485; *Pope* v. *Askew*, 23 N. C., 16; *Mudd* v. *Suckermore*, 31 Com. Law, 406. To admit such evidence would tend to spin out trials indefinitely.

7. For the admissibility of the extract from the Life

of Iredell, see *Monkton* v. *Attorney-General*, 2 Russ & Myl., 431, 3 Phil. Ev. (1859), 597, 6 M. & G., 471; *Morgan* v. *Purnell*, 11 N. C., 95; *Moffit* v. *Witherspoon*, 32 N. C., 185; *Clement* v. *Hunt*, 46 N. C., 400.

8. In reference to the instruction asked for (265) upon the presumption of continuance of monomania—that goes upon the idea that the presumption is a presumption of law, which is not true. *Sutton* v. *Sadler*, 3 C. B. (N. S.), 87 (91, Com. Law); *Crane* v. *Lessee of Morris*, 6 Pet., 598 (p. 616); *Kelly* v. *Jackson*, *ib.*, 622; *State* v. *Patton*, 27 N. C., 180; also upon the erroneous notion that monomania leaves the other faculties wholly untouched. *Dew* v. *Clark*, 3 Add., 79. Shelford (2 Law Lib.), page 30; Taylor's Med. Jur., 626. See remark in Phil. Ev., 3d, 292, showing that evidence of general sanity is always some, though not conclusive evidence of the disappearance of monomania. The doctrine as to a presumed continuance of insanity appears in the books to be applied to cases of general insanity. *Attorney-General* v. *Parnther*, 3 Brown, C. C., 441; *Jackson* v. *Van Dusen*, 5 John., 144; *Gabrill* v. *Barr*, 4 Barr, 441; *Hall* v. *Warren*, 9 Ves., 611; *Kemble* v. *Church*, 3 Hagg., 273; *Clarke* v. *Fisher*, 1 Paige, 174; *Boyd* v. *Ely*, 8 Watts, 70.

READE, J. It was admitted that the paper propounded was executed with the formalities which the law requires.

In the first clause of the paper there is a gift to "Edward Wood, his heirs and assigns forever, subject to such dispositions and instructions as I shall make in a private letter directed to him, and which he will find with this will."

In the second clause there is a gift to "C. W. Hollowell, his heirs and assigns forever, subject only to the instructions I may give in a private letter I shall write him, and will be found with this my last will."

In the third clause there is a gift to "H. J. Futrill, his heirs and assigns forever, subject only to the instructions and provisions I shall make in a private letter directed to him, and which will be found with this my last will and testament."

These clauses dispose of the bulk of the testator's estate, which was a very large one.

(266) The testator then signed his name to the paper, which is without date, and all in his own handwriting.

The writing then begins again, as follows: "Thus, after cool, calm and mature reflection, I have made this my last will and testament in these times of revolution and anarchy, when I know not what a day may bring forth, and when I do not know whether I shall be worth a half, or any portion of the estate I now possess, when I die, for which reason I have made no specific legacies or devises, but rely entirely on the integrity, fidelity and moral sense of my executors appointed by this will, to carry out my intentions and instructions contained in the private letters directed to each of them separately, written with my own hand, and enclosed in the same envelope with this will."

The paper is then signed by the testator, attested by three witnesses, and dated 10th April, 1863. And it is subsequently affirmed and signed again by the testator, attested by two other witnesses, and dated 13th September, 1863.

Three letters purporting to have been written by the testator to the aforesaid persons, Wood, Hollowell and Futrill, were propounded as parts of the will, but they were objected to by the caveators as not being executed with the formalities required for a will; and his Honor instructed the jury that, taking all the testimony to be true, they could not be set up as parts of the will. The caveators then asked his Honor to instruct the jury, "That, by reason of the rejection of these letters as parts of the alleged will, a trust resulted to the heir-at-law in all the property mentioned in the first paragraphs of the several devises and bequests to Wood, Futrill and Hollowell, which were made subject to the dispositions and instructions of said letters. That this was so by the law of England. But that the County Courts of this

State, being courts of probate of wills both of real and personal estates, and the paragraphs aforesaid in the attested instrument being subject to and dependent upon the private letters, which could not be (267) recognized as parts of the will. It was unfinished and void as to those paragraphs." The Court declined to give the instruction, and the caveators excepted. This exception involves the consideration of the powers and duties of our County Courts as courts of probate, for the case is to be considered here as it ought to have been considered in the County Court.

In the full and very able discussion with which we were favored by the counsel on both sides, the exception was considered as if the reference in the will were to private letters, which were not in existence at the time the will was executed, but thereafter to be written. The language of the will is not very clear, and there may have been facts outside, which led to this conclusion. The language would seem to indicate that the letters were written at the time the will was executed. It is true that, in the body of the will, the reference is to letters which "I shall write," but, in the concluding clause above quoted the reference is to letters "written with my own hand, and enclosed in the same envelope with this will"; so that it seems probable, judging only from the language itself, that the testator wrote his will and signed it, and then wrote the letters, and then wrote the concluding clause and signed it again, and called in witnesses and had it attested. The letters were certainly written when the will was reaffirmed, September 13, 1863. But however this may be, it could only be important on the trial upon the question whether the letters were part of the will; and that question was decided against the propounders, and they did not appeal. In passing upon the question, whether the will itself was to be admitted to probate, it makes no difference whether the letters could be admitted to probate or not; or whether they were written when the will was executed, or were thereafter to be written; or whether the letters propounded were the letters referred to;

(268) or whether any letters were ever written either before or after the execution of the will. These questions may be important hereafter when the construction of the will comes under consideration, but they are of no consequence in the probate court, upon the trial of the issue of *devisavit vel non.* And this brings us to the consideration of the powers and duties of our courts of probate.

"The Courts of Pleas and Quarter Sessions shall, within their respective counties, take the probate of wills, and order them to be recorded in proper books kept for that purpose." Rev. Code, chap. 119, sec. 13. And if the validity of any last will and testament, whether written or nuncupative, shall be contested, the same shall be always tried by a jury, under an issue made up under the direction of the court. *Ib.*, 15. The uniform practice, when a paper-writing is offered for probate as a will, has been to prove the execution of the paper and obtain an order that it be recorded, without consideration of its contents, except so far as to see that it purports to be a will. And where the validity of the will is questioned, and it is submitted to a jury, the jury is restricted to the same inquiries. Where there is no objection, the court passes upon the validity of the paper, and where there is objection, the jury passes upon it; and, in either case, the proceeding is *in rem.* The probate passes upon the rights of no one under the will, but only establishes it as a will, leaving the rights of parties to be ascertained thereafter. We are not aware of any inconvenience or injustice that has resulted from this practice, and we believe that this is the first instance in which a departure has been insisted upon. Indeed, it was admitted at the bar to be a case of the first impression. The practice is in accordance with what we may suppose the theory to have been, and with the constitution of our probate courts. The justices who hold the courts are unprofessional men taken from the body of the people, and, therefore, incompetent to the task of construing wills; yet they are quite competent (269) to pass upon the facts as to the execution of the paper, and in the same way jurors are competent to pass upon such facts, when they are submitted to them But our County Courts have not the learning which is necessary to construe wills and declare rights, nor have they the power or the means to declare and enforce trusts. We have tribunals with sufficient learning and adequate powers to these ends. But now it is insisted that when a paper is propounded for probate in our County Courts, the court or the jury, as the case may be, shall look not only to the paper to see whether it has the formalities which the law requires, and is in all respects complete as an instrument, but also into the contents of the instrument, to see whether the testator has used such language as in their opinion will effect what they may suppose to be his intention; and if the language is inartificial, so that there is doubt as to who will take the property, the instrument itself shall be declared to be "unfinished."

The inconvenience and confusion to result from such practice are palpable. If the construction of the instrument is to precede its probate, then it would often be, that after the contents are explained and its meaning ascertained, the instrument itself would be declared void for the want of some formality in the execution, or of capacity in the testator. And, in almost every case, the qualification of the executor, and the ordinary administration of the assets, would be postponed until all the persons interested, or claiming to be interested in the legacies, shall have their rights declared; and after that, it may turn out that the whole estate is exhausted in the payment of the debts, so that nothing is left for the satisfaction of the legacies. In this case the court was asked to determine the question between the legatees and devisees on the one side and the heirs-at-law on the other, when it may turn out that there are debts enough to exhaust the whole estate, so that neither the devisees nor the heirs have any interest. Whereas, under (270) the usual practice, the will would be admitted to probate, the executor qualify and administer the assets, and in proper time, and in the proper court, the

devisees and the heirs-at-law have their rights settled. The caveators insist that the gifts to Wood, Hollowell and Futrill were upon trusts to be declared, and that no trusts were ever declared, and, therefore, there is a resulting trust to the caveators as the heirs-at-law. Supposing that to be so, they add that the will is "unfinished," and can not be admitted to probate. But the doctrine of unfinished, or incomplete instruments, applies not to the construction of the contents, but the execution of the instrument. It may be shown that a testator intended that his estate should be divided *per stirpes*, but by reason of inartificial language, it will be divided *per capita;* but such a will would not be called "unfinished." So, in his will duly executed, he may declare his purpose to execute a codicil, which he fails to execute; still his will is "finished," and must be admitted to probate. So the doctrine of conditions precedent and subsequent apply not to the validity of the will, but to the vesting or not vesting of the legacy. Many cases were cited by the counsel for the caveators to show that papers referred to, which were not in existence at the time, but thereafter to be prepared, and also papers which were insufficiently described, could not be set up as parts of a will; but no case was cited to show that the wills themselves were refused probate because the papers referred to were rejected. Indeed, in the cases cited, the wills were established. If a paper, purporting to be the will of a *feme covert*, were offered for probate, the probate court would reject it, because a *feme covert* has not the power to make a will; but if marriage articles were produced which purported to allow the *feme covert* to make a will, then the will would be admitted to probate without looking into the articles for the purpose of construing them, any further than to see that they give color to the act of the
(271) wife. In the case of *Whitfield* v. *Hurst*, 31 N. C., 170, Ruffin, C. J., says: "In the first place, the court holds that the marriage contract is to be deemed in this proceeding an authority to the wife to make a will. We do not mean that we now put a final con-

struction on that instrument, and determine that it vested a separate estate in the wife, either absolute or temporary; for those are points not proper for the construction of the court in a probate cause. It is true that this court exercises as an appellant tribunal the functions both of a court of probate and a court of equity; and, therefore, it might be supposed that it would be well to decide all the questions that could arise under that instrument at once. But in the form in which the case is now before us, the court can only deal with such matters as were cognizable before the County Court in this very case, because we are not proceeding originally, but reviewing the decision of that and of the Superior Court. Therefore, we put no construction on the paper further than to say that it at least gives a color to the act of the wife, for that is sufficient to induce the court of probate to admit the paper, leaving it to a court of equity ultimately to construe and enforce the articles, and compel the execution of the will, if made in view of that court under a sufficient authority, or by virtue of a sufficient estate in the wife." So, in the case of *Redmond* v. *Collins*, 15 N. C., 430, the question was discussed whether under the will which was offered for probate, the executors took the legal estate, or whether a power only was given them, whilst the land descended to the heir. The court says: "The question before such a court (court of probate) is, whether the paper is duly executed to pass the legal estate? It has no concern with the trusts upon which it is given, or to the construction of the will, which must be enforced in this, as in other respects, in another court."

The exception which we are considering in this case clearly shows the confusion which would result from the practice which it seeks to establish. Four (272) papers are offered for probate. It is not for the court, but for the jury, under proper instructions, to say whether any or all of these papers be a will. The court instructed the jury that, all the evidence being true, three of the papers had not the formalities which the law required, and therefore they could not be set

up, and that they must find against these three papers Now, if the propounders had objected to this charge, and had appealed, it would have been necessary to set forth the evidence, to see whether the instruction was right. But the propounders did not except, and, therefore, there is nothing to be considered upon that part of the case. But how about the fourth paper? What is to become of that? The three papers were not executed according to the formalities which the law requires; they were not attested, nor were they found with the valuable papers or effects of the testator, nor deposited with a friend for safe keeping. It was proper, therefore, for the Judge to tell the jury that, taking all the evidence to be true, they must find that they were no part of the will. But the fourth paper had all the required formalities; it was properly written, signed and attested, and therefore his Honor could not charge the jury that, taking all the evidence to be true, it could not be set up as a will, but would have to charge them precisely the contrary; and, therefore, he was asked to take the question of fact from the jury, and to declare as a matter of construction that, because they had found against the other papers, this paper was unfinished and void. Upon the trial of the issue of *devisavit vel non*, it was for the jury to say whether the paper was or was not finished, under proper instructions as to what constituted a finished paper. And just as he had charged the jury that if they believed the evidence they must find against the three papers, so he must charge them that, if they believed the evidence, they must find for the fourth paper. Yet he was asked to declare as a matter of construction of the contents, without regard to the formalities of execution, that there was a re-
(273) sulting trust to the heirs, and, therefore, what?—
not that the will must be set up, and the trusts declared and enforced by a court of equity according to the course and practice of the court, but that the will itself was unfinished and void. He was obliged to tell the jury that the letters were no parts of the will, whatever might be their contents, because they had not the

formality of execution which the law requires. If, then, the formalities of execution without regard to the contents were decisive of three of the papers offered, why was not the formality of execution, without regard to the contents, decisive of the fourth paper? If the Judge could not look into the contents of the three papers, and set them up, because they did contain the will of the testator, how could he look into the contents of the fourth paper, and reject it because it did not contain his will.

It will be noticed that we do not consider the question whether there is a resulting trust to the heirs or not. It may be that the devisees will take the property, discharged of all trusts; or, it may be that the trusts declared in those letters may be enforced; or, it may be that there are other letters yet to be produced.

Our conclusion is, that when a paper-writing, purporting to be a will and offered for probate, is executed with the formalities which the law requires, by a person who is competent to make a will, it must be admitted to probate, without regard to the construction of its contents, or the consideration of any trusts which may be declared or which may result to the heir.

2. It was not agreed at the bar, and we are unable to determine from the exception, which party introduced in evidence the declaration of the testator that one of the caveators was a gambler. Nor does it appear at what time of the trial it was introduced. If it was introduced by the propounders in their beginning, (274) then the proper time for the caveators to meet it was in their answer. But if the propounders introduced it in their reply, then the caveators could have met it in their rejoinder. In justice to the learned Judge who tried the cause, it ought to be presumed that, if the propounders introduced the evidence, it was in their beginning and not in their reply, because the Judge puts his refusal to allow the caveators to offer evidence to disprove the truth of the declaration, upon the ground that it was not offered in apt time. It would have been in apt time, if offered at the first opportunity, and,

therefore, we are to take it that it was not offered at the first opportunity, for the charge of the Judge is presumed to be right, unless it is shown to be wrong. If, therefore, there was error, it is the misfortune of the caveators, because it was incumbent on them to sustain their exception, by showing that there was error. It is true that the presiding Judge may allow evidence to be introduced at any time before the verdict is rendered, but this is at his discretion. The course and practice of the court as to the order in which the testimony is to be introduced is well settled and well understood by the profession. It is very important that it should be observed. It ought not to be departed from, except in cases of surprise or mistake in matters seriously affecting the merits of the cause, and of that the presiding Judge has a discretion which we can not review. It is not to be presumed in any case that the discretion will be abused. We have great satisfaction in believing that the parties to this cause were indulged upon the trial below in every reasonable relaxation. And it is to be mentioned in high commendation of the learned Judge and the eminent counsel who tried the cause, that although the trial occupied a month, and many embarrassing questions arose, not an error is discovered in any part of the proceedings, and if by inadvertence the evidence was lost in the particular now under consideration, it is a relief to know that it could scarcely have been (275) material; for, whether the person alluded to was a gambler or not, the testator thought he was, and his belief of that fact would as certainly have excluded him from his bounty as if the fact existed. The only light in which it could have been important to contradict it, was to show that the testator must have been under an insane delusion, to believe a man to be a gambler who was not so in fact. But it is such slight evidence of insanity to make such a mistake, that, unless the case had been precisely balanced, it could not have turned it.

3. In order to show the insanity of the testator, the caveators proved that, on some occasion, he acted in

what seemed to be a strange manner. As an explanation, the propounders were allowed to offer evidence to show that the alleged conduct was not an indication of insanity, but was only a peculiarity, and was habitual with the testator when he was admitted to be sane. And the caveators excepted. There is no force in the exception. All men are not alike. Their minds, manners, temper and habits are as various as their faces. And in investigating the state of the mind as indicated by any particular conduct, it is legitimate to compare that with his general conduct when he is admitted to be sane. We know that the contraction of the brows, a frown, is indication of displeasure, but if what seems to be a frown is a natural formation, or a habit, or a peculiarity, it would be proper to show it, in order to rebut a false but natural inference. So, if excessive mirth, as is common with some, or excessive sadness, as is common in others, were relied on to show insanity, of which it is sometimes an accompaniment, it would be competent to show that these appearances were habitual and natural. But suppose this were not true, what right have the caveators to complain of the evidence? For, if a single act of the kind relied on by them was evidence of insanity, then continued acts of the same kind, proved by the propounders, were multiplied evidence of the same thing, and, therefore, aided the caveators in making out their case.

276) 4. Some two years after the testator had made his will, he made a statement to G. J. Cherry, explaining why he had made his will; and he caused Mr. Cherry to write down the statement. After the statement was written, Mr. Cherry read it over to the testator, and he approved it, and requested Mr. Cherry to sign it, which he did. Some time thereafter the testator caused J. E. Norfleet to read over to him the same statement, and he acknowledged and approved it, and Mr. Norfleet signed it. This paper was offered in evidence by the propounders to show capacity. And the caveators excepted. The exception is taken upon the ground that the only use which could be made of the

paper was to refresh the memory of the witness, who might speak of the statement. But this paper is not what the witness wrote down of his own mind to refresh his memory, but it was the dictation of the testator, and though written down by another, was adopted and approved by him, and is the same as if he had written it himself. The names of Cherry and Norfleet which they put upon it, were only marks by which they could identify it. The contents of the paper, dictated by the testator, were unquestionable evidence of his capacity, and the paper was properly admitted.

5. It is well settled that the opinion of an expert is competent evidnce in questions touching the science or art which he professes. And when an expert has given his opinion, it is also competent for him to give the reasons upon which his opinion is founded, in order that it may be seen whether his opinion is entitled to more or less weight. And, in this way, and in this way only, can it be determined whose opinion is entitled to most consideration, where experts differ. Here the caveators took the opinion of an expert as to the sanity of a testator, and then attempted to elicit facts to support the opinion. And if the facts sought to be elicited were relevant, then it was error to exclude them. What, then, were the facts sought to be elicited? Not (277) anything that he had learned in relation to the testator, or anything which he knew or had learned from science or from scientific men, but facts which he had heard an insane man relate as to the history of his disease, and facts which he had heard an unprofessional nurse relate of the history of the patient, facts to which he had applied no test of truth, and to which none could be applied. Surely the exclusion of such testimony from the consideration of the jury was most proper, and so far from injuring, must have benefitted the caveators; for, if the expert had sustained his opinion upon such considerations as these, his conclusion would have been as worthless as his reasons were frivolous. They could not possibly have added any weight to the most hesitating, and they would certainly have

detracted from the most confident, opinion. Courts charged with the investigation of truth are greatly indebted to men of science who contribute the aid of their opinions. But marvellous narrations and careless stories disparage science, mislead rather than instruct, and ought not to be allowed consideration.

6. The catalogue of the testator's family and connections, contained in a book which he aided in having published, and which he said was a correct "account of his family," was competent evidence for the purpose for which it was introduced.

7. Sanity is the natural and usual condition of the mind, and, therefore, every man is presumed to be sane. But this presumption may be rebutted, *i. e.*, the contrary may be proved, in any given case. What amount of evidence is sufficient to rebut it is a question not of law for the court, but of fact for the jury. When the presumption is rebutted and insanity is established, then there is a presumption that insanity continues. But the presumption may be rebutted, *i. e.*, the contrary may be proved to be the fact. What amount of evidence is sufficient to rebut it is also a question not of law but of fact. If it was established in this case (278) that the testator was insane at any time, then insanity is presumed to have continued. But the presumption might be rebutted. And what amount of evidence was sufficient to rebut it was a question not of law but of fact. If therefore the transaction of ordinary business was any evidence to rebut the presumption of the continuance of insanity, the Judge could not have instructed the jury as he was asked to do, that it was not sufficient evidence; for the sufficiency of evidence is never a question of law, but is a question for the jury. The fact of asking the Judge to charge the jury that it was not sufficient, seems to imply that it was some evidence. We think that the transaction of ordinary business by the testator was some evidence of his sanity, and, therefore, it was some evidence to rebut the presumption of the continuance of insanity. And the weight of the evidence was properly left to the jury.

Observe that this would be so even if a case of general insanity were under consideration. But this was a case of alleged partial insanity, of recent occurrence, and probably of temporary character, and, therefore, the presumption of its continuance was not a strong presumption, and a jury might be satisfied with much less evidence to rebut it than if it had been of a general or more permanent character. Insanity from drunkenness, fever, grief, or other exciting cause, usually abates, and, therefore, may be presumed to abate, as the exciting cause is removed. And whether the exciting cause has been removed, and whether the mind is restored, and what is sufficient evidence in any given case, depends upon its peculiar circumstances, and can not be a question of law. It was very properly left with the jury in this case.

The estate involved in this controversy was one of the largest in the State. The counsel on both sides were eminent and zealous, and the learned Judge was patient and discriminating. The questions were numerous, and some of them were intricate. The exceptions, of (279) which there were many, were all abandoned in this court except those which we have considered. We believe that the rights of the parties, so far as they could be considered in this proceeding, have been fairly passed upon.

This opinion will be certified to the court below, to the end that a *procedendo* may issue to the County Court to admit the will to probate.

PER CURIAM. There is no error.

Cited: *Lawrence* v. *Steel*, 66 N. C., 588; *McLean* v. *Elliott*, 72 N. C., 72; *Mayo* v. *Jones*, 78 N. C., 403; *Dupree* v. *Ins. Co.*, 92 N. C., 425; *Fitzgerald* v. *Shelton*, 95 N. C., 525.

JOSEPH MARDRE v. WILLIAM FELTON.

1. The 5th section of the Ordinance of 1866, entitled "An Ordinance to change the jurisdiction of the Courts," etc., does not apply to prevent the issue of a writ of *venditioni exponas*, to enforce a levy upon land made more than a year and a day previously.
2. That construction of a statute which attributes to the Legislature the exercise of a doubtful power, will not, in the absence of direct words, be readily adopted.

(Discussion of the doctrine in *Smith v. Spencer*, 25 N. C., 256.)

(*Parker v. Shannonhouse, ante*, 209, cited and approved.)

MOTION made before *Shipp, J.*, at Spring Term, 1867, of the Superior Court of Perquimans, for a *venditioni exponas*, upon the following facts agreed:

At Spring Term, 1861, of that court, a judgment had been rendered against the defendant in favor of the plaintiff for $1,350 and costs. Upon this judgment a *fi. fa.* had been issued from said term and levied upon a tract of land belonging to the defendant. From the next term a writ of *ven. ex.* was issued, and returned to the succeeding term, "No sale for want of bidders." Since that no execution had been issued.

(280) His Honor, *pro forma*, allowed the motion, and the defendant appealed.

Smith and *Gilliam*, for the plaintiff.
No counsel for the defendant.

PEARSON, C. J. The question is: 1st. Does the fifth section of the ordinance of the Convention of 1866, entitled "An ordinance to change the jurisdiction of the courts," etc., which provides that no *scire facias* shall be thereafter issued to revive a dormant judgment, include within its operation a motion for a writ of *ven. ex.* or an order to the sheriff to sell a tract of land which had been levied on more than a year and a day prior to the motion, but for some reason or other had not been sold? 2d. If the ordinance does include a motion of the kind, is it not in that respect unconstitutional?

In *Parker* v. *Shannonhouse*, *ante*, 209, it is held that this section of the ordinance, confining its operation to a *scire facias* to have execution of a judgment by a writ of *fieri facias*, is not unconstitutional, for the reason that the remedy at common law was an action of debt on former judgment; and the Statute Ed. I, chap. 45, Rev. Code, chap. 31, sec. 109, gives the creditor an additional remedy; so the effect of the ordinance is to repeal the statute in regard to this additional remedy, and to leave the creditor in respect to the remedy as at common law. But if the ordinance be made to include a writ of *ven. ex.*, or order to sell property levied on, the reasoning in *Parker* v. *Shannonhouse*, as to the common law remedy by action of debt, can have no application; and the naked question would be presented, Had the Convention power, under the restrictions imposed by the Constitution of the United States, to take from the plaintiff his right in the tract of land levied on, taken *in custodia legis* and set apart for the satisfaction of his judgment, and leave him at large, as he would be if put to his action of debt? His Honor (281) was of opinion that the case is not included under the fifth section, and that the plaintiff was entitled to a writ of *ven. ex.*

There is no error. In *Smith* v. *Spencer*, 25 N. C., 256, it is held that a purchaser of land under a writ of *ven. ex.*, issued more than a year after the levy without notice to the defendant, was entitled to recover against one who had purchased at a sale made by a trustee for creditors under a deed executed by the debtor after the levy, on the ground that the levy creates a lien, which sets apart the land for the satisfaction of the judgment, and there is nothing to take it out of the custody of the law before the debt is paid, as against the defendant and all claiming under a conveyance made by him; and a *ven. ex.* may issue at any distance of time, unless the levy has been waived or is overreached by a sale under a junior execution. A distinction is taken between a *fieri facias* and a *venditioni exponas;* and it is decided that the latter is not "a writ of execution," within the operation of the Statute 13 Ed. 1, chap. 45, and the court uses this strong language: "We can see no reason why the defendant should claim to have the levy discharged, so as to prevent any action on it, unless that action be immediate and continued; he is not injured by its being enforced at any distance of time, and as to him the law may justly preserve the lien, until satisfaction of the debt be had." This decision was before our statute (Rev. Stat., chap. 31, sec. 114), went into operation, but the reasoning is applicable to both statutes, and the two must obviously have the same construction in respect to what executions come within their operation.

By the common law, if a *capias ad satisfaciendum*, or *fieri facias*, or *levari facias*, or *elegit* was sued out, on a judgment which had been satisfied, there being no entry of satisfaction on the record, the defendnat had no "day in court," and was put to his writ of "*audita querela*," which operated as a *supersedeas* to the execution until the allegation of satisfaction was disposed of. (282) A resort to this writ, in order to get a day in court, was inconvenient and expensive. To remedy this evil, 13 Edw. I, chap. 45, provides that no writ to have execution of a judgment shall issue after a year and a day from the rendition thereof, unless the plaintiff shall give the defendant a day in court by *scire facias*. In the construction of this statute, it became settled law that if a writ of *fieri facias* was issued within a year and a day from the rendition of the judgment, the plaintiff could sue out another writ of *fieri facias* at any distance of time, as at common law, and thus put the defendant to his writ of *audita querela*, in order to get a day in court, to show that the judgment had been satisfied. 2 Inst., 469. The inconvenience growing out of this construction gave rise to our statute (Rev. Stat., chap. 31, sec. 114; Rev. Code, chap 31, sec. 109), by which it is provided that "no execution shall issue upon any judgment after a year and a day from the rendition thereof," following the Act of Edw. I, but changing the proviso, so as not to allow the clerk to issue an execution in cases where one had been issued within a year and a day, unless it was applied for within a year and a day "from the issuing of the last execution." In other words, the issuing of the last execution, instead of the rendition of the judgment, was made the date from which to count the year and a day, after which the plaintiff could not sue out execution without giving the defendant a day in court.

This being the whole scope and effect of our statute, it would seem that if *Smith* v. *Spencer* is well decided, that statute does not include an order to sell property levied on, whether, in the language of Judge Henderson (*Seawell* v. *Bank of Cape Fear*, 14 N. C., 279), "it be simply called an order of sale, or be dignified with the name of a writ of *venditioni exponas.*"

In respect to personal property, it is certain that neither the statute, 13 Edw. I, nor our statute, (283) includes a writ of *ven. ex.*, and it may be sued out at any distance of time without notice to the defendant, provided the lien has not been waived, for the levy vests the ownership of the property in the sheriff, and he has power to sell without the writ, the only occasion for it being to compel the sheriff to do his duty, which, of course, may be done at any distance of time. But in respect to land we incline to the opinion, as the levy does not vest the ownership of the property in the sheriff, and he has no power to sell after the return day of the *fieri facias*, unless a writ of *ven. ex.* be issued, that the case comes within the operation of our statutes, for the words are broad enough to include it; the mischief is the same, and the remedy is equally fit and appropriate; *i. e.*, by requiring the plaintiff to give the defendant a day in court before he can have an order to sell the land levied on, if he does not apply for it until after the expiration of a year and a day from the issuing of the original execution.

But, taking this to be so, we think it entirely clear that the fifth section of the ordinance under consideration can not, by any construction, be made to include either a writ of *ven. ex.*, in respect to personal property, or to land; for the words are not broad enough to include orders of this kind, and are fully satisfied by allowing their operation in cases where it is necessary to have execution of a judgment by a writ of *fieri facias*. The supposed mischief is entirely of a different nature, and the remedy by action of debt is inapplicable; indeed, it is no remedy at all, for it requires the plaintiff to forego the lien created by the levy, and to take a new judgment, upon which he can only have the ordinary writ of *fieri facias*.

It was argued by Mr. Winston that the eighth, ninth and tenth sections of the ordinance, in which the writs of *fieri facias* and *venditioni exponas* are specially named and put on the same footing, show that by a proper construction the fifth section was meant to include writs of *ven. ex.* as well as writs of *fieri facias*, "on the (284) broad ground of a general intention to put a stop to the collection of debts in every shape and form." We are unable to see the force of the argument.

The conclusion, that a motion for the writ of *ven. ex.* is not within the operation of the fifth section of the ordinance, makes it unnecessary to express an opinion upon the point, whether the Convention had the power to deprive the plaintiff of his lien, or right as against the debtor to have the particular tract of land applied to the satisfaction of his judgment.

We will merely say that a construction involving the exercise of a doubtful power will not be readily adopted in the absence of direct words, when the words used admit of another construction which steers clear of all questions in regard to power.

PER CURIAM. Judgment affirmed.

Cited: *Boyd* v. *Murray*, 62 N. C., 241; *Riddick* v. *Hinton*, *post*, 293; *Overton* v. *Abbott*, *post*, 294.

Dist.: *Smith* v. *Smith*, 72 N. C., 228.

WILLIAM F. BANKS and others v. B. J. SHANNONHOUSE and wife, and others.

1. A conveyance of land to a son-in-law is not to be reckoned as an advancement to the daughter, who, at the death of her father, was married to a second husband.
2. A gift of slaves accompanied by a warranty of the title forever (made some years before the late war), constitutes an advancement of the value of them when given, without reference to their subsequent emancipation by the results of the war.

(*Bridgers v. Hutchings*, 33 N. C., 68, cited, distinguished and approved.)

EXCEPTIONS to a report in a petition for partition of land and an account of advancements, heard before *Shipp, J.*, at Spring Term, 1867, of the Superior Court of Law of Pasquotank, and brought before this court by appeal.

(285) The petition had been filed in the County Court, and having made the heirs of Willam F. Banks parties thereto, sought a partition of certain lands of which he died seized in 1863, and an account of all advancements of real and personal estate received by the parties from the deceased. Among the parties-defendant were B. J. Shannonhouse and wife Mary, who were charged with having been largely advanced in realty and personalty.

These defendants denied that they had been advanced in lands; and in regard to personalty, which they admitted that Mrs. S. had received, they objected that a large part of it consisted of slaves, the title to which the deceased had warranted to her forever, and claimed that as these had been taken from her by the act of the government (emancipation), the amount at which they had been charged by the deceased should be reduced. They admitted that one Harvey, who was a former husband of Mrs. S., had purchased a tract of land for full value from the deceased.

Evidence was offered tending to show that the deceased, in selling to Harvey, had allowed him, in the way of advancement, $4,000, out of the $5,860 which was set forth in the deed to Harvey as the price of the land.

The referee, who was ordered by the County Court to take an account of the advancements, charged Mrs. Shannonhouse with the full value of the slaves, and with the $4,000 said to have been allowed to Mr. Harvey on the price of the land. Ths report having been excepted to, was set aside (*pro forma*) by the County Court, and upon appeal to the Superior Court, was confirmed by his Honor, *pro forma.* Thereupon the defendants Shannonhouse and wife appealed.

Smith, for the petitioners.

1. An advancement to a son-in-law is an advancement to the daughter. *Bridgers* v. *Hutchings*, 33 N. C., 68. See Rev. Code, chap. 38, Rule 2.

(286) 2. The recital of a consideration in a deed for land does not conclude the question of advancement, especially in cases of mistake and misapprehension of the effect of the deed. *Streater* v. *Jones*, 10 N. C., 423; *Jordan* v. *Blount*, 17 N. C., 555; *Kimbrough* v. *Smith*, *Ib.*, 558; *Jones* v. *Spaight*, 6 N. C., 89; *Creedle* v. *Creedle*, 44 N. C., 225; 2 White & Tudor Lead. Cas. Eq., Part 1, 564; *Quarles* v. *Quarles*, 4 Mass., 680; *Bulkly* v. *Noble*, 2 Pick., 337; *Meeker* v. *Meeker*, 16 Conn., 383.

No counsel for the defendants.

PEARSON, C. J. The first exception of defendants Shannonhouse and wife is allowed.

The deed of Banks, the father of Mrs. Shannonhouse, to Harvey, her first husband, is an absolute conveyance to him in fee simple of a tract of land in consideration of $5,860. She is not named in the deed, and takes nothing under it; so, standing alone and without explanation, it can furnish no ground whatever to support the allegation of an advancement to her.

Waiving all objections to the evidence offered by the petitioners, and taking the fact to be that the father supposed he was making an advancement to his daughter, by making this conveyance to her husband, to the amount of $4,000 in part of the purchase-money, it is perfectly clear that Mrs. Shannonhouse has received of her father no land by way of advancement, and nothing as equivalent therefor, or as a substitute for it.

Mr Smith relied upon *Bridgers* v. *Hutchings*, 33 N. C., 68, where it is held, a gift of personal property to a husband is an advancement to the wife, and insisted that there was no difference between a gift of personal property and a gift of land.

In our opinion there is a very essential difference. (287) If personal property be given to a wife, it instantly, *jure mariti*, belongs to the husband; so it is immaterial whether the gift be made to the wife or to the husband. But if land be given to the wife it remains hers, and the husband can only become entitled to a life estate as tenant by the curtesy; whereas, if it be conveyed to the husband, the wife takes nothing, save a collateral right to have dower in case she survives; so it can not be said in any sense that she has received of her father any land by way of advancement.

Mr. Smith suggested that the wife has an equity, on the ground of mistake, to convert the heirs of her first husband into trustees for her, to the extent of this $4,000, and for that reason it should be treated as an advancement. We can see no reason why she should be excluded as an heir, and be forced to take upon herself alone the risks of setting up an equity against the heirs of her first husband. The mistake or inadvertence was on the part of their common ancestor, and his equity to have the matter put right devolved upon all his heirs; and the way is open for the heirs, if so advised, to file a bill in order to set up this equity. Apart from this, it may be that should Mrs. Shannonhouse take dower of the estate of her first husband in respect to this $4,000 worth of land, the other heirs of her father may have an equity against her for contribution, but that possibility can in no wise support the allegation that she has received of her father land by way of advancement.

There is error in the order refusing to allow the first exception.

The second exception is not allowd. The slaves constitute an advancement as of their value at the time they went into the possession of Mrs. Shannonhouse, and their "political death" afterwards is the same in legal effect as if they had died a natural death.

There is no error.

The appeal being from an interlocutory order (288) refusing to allow both exceptions, Shannonhouse and wife are entitled to the costs of this court.

This opinion will be certified, to the end that further proceedings may be had in the court below.

PER CURIAM. Ordered accordngly.

JOHN O. ASKEW v. JAMES S. STEVENSON.

1. An attachment issued by the Clerk of a Court for a sum within the jurisdiction of the Court, and made returnable to the proper term of the Court, will not be dismissed for want of form because directed "to any Constable or other lawful officer to execute and return within thirty days (Sundays excepted)," it appearing that it was executed by the sheriff.
2. Where Court was not held at the return term of an attachment, nor at the succeeding term, and at a subsequent term the defendant replevied the property attached: *Held*, that the cause was not discontinued.

(*State Bank v. Hinton*, 12 N. C., 397, and *Leak v. Moorman*, *ante*, 168, cited and approved.)

MOTION to dismiss an attachment, heard before *Shipp*, *J.*, at Spring Term, 1867, of the Superior Court of Hertford.

The process was issued February 22, 1865, by the Clerk of the Superior Court, and directed "To any lawful officer to execute and return within thirty days from the date hereof (Sundays excepted)''; but in the body of the writ it was returnable to the succeeding March Term of the court. It was placed in the hands of the sheriff, who levied the same February 24, 1865, on certain property of the defendant, real and personal. The attachment recited that the defendant was indebted to the plaintiff in the sum of $770, or thereabouts. No term of the court was held in the spring or fall of 1865. The sheriff's return was made to Spring Term, 1866. Publication was then ordered. At Spring Term, 1867, the defendant moved to dismiss, without replevying. The motion was refused; the defendant then (289) filed a bail bond and renewed the motion. His Honor thereupon allowed the motion, and the plaintiff appealed.

Yeates, for the appellant.

1. The attachment, though not in technical form, expresses all that is required by Rev. Code, chap. 7, sec. 4.
2. Public disturbances prevented the holding of the court in the spring of 1865, and a term was not provided for in the fall of 1865. Rev. Code, chap. 31, sec. 24, continues the cause one term.

Smith, contra.

1. The process of attachment being in derogation of common right, must conform strictly to the requirements of the statute. If issued by a justice of the peace, and not returnable at a certain day, or within thirty days, it is void *Washington* v. *Sanders*, 13 N. C., 343; *Clark* v. *Quinn*, 27 N. C., 175; *Houston* v. *Porter*, 32 N. C., 174.
2. It may be dismissed on motion of defendant, without pleading or replevying. *Britt* v. *Patterson*, 31 N. C., 197.
3. The cause was discontinued by failure to hold terms in spring and fall of 1865.

BATTLE, J. It is settled, both upon reason and authority, that the statute which gives an attachment must be construed strictly. *State Bank* v. *Hinton*, 12 N. C., 397; *Leak* v. *Moorman*, *ante*, 168. Still it is not to be abated for mere want of form, if the essential matters expressed in the prescribed form are set forth. See the last clause of the fourth section of the seventh chapter of the Revised Code. The objection urged against the precept of the attachment in the present case is, "that it is directed to any constable or other lawful officer to execute and return within thirty days from the date hereof (Sundays excepted)." From this it would appear that it was a case within the (290) jurisdiction of a single magistrate, while the body of the precept shows that it was within the jurisdiction of the Superior Court. The precept, however, purports to have been, and was issued by the Clerk of the Superior Court, and was made returnable to the proper term of that court. It appears further from the proceedings, that the writ was issued to the sheriff of the county, and was, in fact, duly executed by him. This cures the informality of the direction to the "Constable," as well as to any "other lawful officer"; and it is clear that the certain direction as to its return contained in the body of the precept supersedes that inserted in the caption.

In this view of the subject, the cases cited by the defendant's counsel to show that attachments issued by justices of the peace and not returnable at a certain day, or within thirty days, are void, have no application.

Another objection has been made, which is, that the cause was discontinued, for the reason that no court was held at the return term of the writ, nor at the next succeeding term.

To this, it is replied by the plaintiff that the discontinuance, if any, was prevented by the defendant's having appeared and replevied the property attached. The defendant rejoins that his motion to dismiss the proceedings was made before he had replevied, and, that as the court would not entertain his motion until he had done so, he ought to have the benefit of it, as of the time when it was first made. We can not give the effect to his rejoinder, for which the defendant contends. When his motion to dismiss was refused, he ought to have appealed, if he had the right to do so, or, if he had no such right of appeal, and his motion ought to have been sustained, he might have treated the proceedings as a nullity, and brought an action at law to recover the personal property attached, or its value, and have refused to surrender the possession of the real estate. As he did not choose to avail himself of either of those remedies, whch would have been well founded (291) upon the supposition that the suit was discontinued, he must be held to have waived the objection, by coming forward and replevying the property attached. By doing so he virtually admitted that the cause was still in court, and that he was there ready to defend himself against it. This view of the case makes it unnecessary for us to decide whether the cause was not continued from term to term of the Superior Court until the attendance of a Judge to hold the court, by virtue of the provision in the Revised Code, chap. 31, sec. 24 It certainly was continued for one term, and there are no restrictive words expressly confining the continuance to one term only.

The order for dismissing the proceedings must be reversed, and the cause remanded for further proceedings in the Court below.

PER CURIAM. Judgment reversed.

Cited: State v. *Horton*, 123 N. C., 696.

WILEY RIDDICK v. JOHN M. HINTON and others.

The fifth section of the Ordinance of 1866, entitled "An Ordinance to change the jurisdiction of the courts," etc., does not extend to a writ of *scire facias* asking for a *ven. ex.*

(*Mardre v. Felton, ante,* 279, cited and approved.)

SCIRE FACIAS, requiring defendant to show cause why a *venditioni exponas* should not issue, tried before *Shipp, J.*, at Spring Term, 1867, of the Superior Court of Pasquotank.

The plaintiff had recovered judgment against the defendants for a large sum at Spring Term, 1861, of that court. A writ of *fi. fa.* was immediately issued, and was returned to the next term, having been levied upon certain land. No other execution was issued upon (292) the judgment until May, 1866, when the present *scire facias* was taken out, returnable to Fall Term, 1866, of that court, requiring the defendants to show cause why the plaintiff should not have a writ of *venditioni exponas* to sell the land previously levied upon.

His Honor, *pro forma*, dismissed the proceeding, and the plaintiff appealed.

Smith and *Gilliam*, for the appellant.

The levy vested in the plaintiff a right to have his debt satisfied therefrom, the only mode of enforcing which is a *sci. fa.;* therefore the ordinance, so far as it destroys this lien, is unconstitutional. *Dash* v. *Vancleek*, 7 Johns., 503; 1 Kent., 455; 3 Story Const., sec. 1393; *Chesnut* v. *Shaw*, 16 Ohio, 599.

Laws can not divest rights, under color of dealing with remedies alone. *Canal* v. *R. R. Co.*, 4 Gill & I., 1; *Nevil* v. *Bank of Port Gibson*, 6 Sm. & M., 513; *Barnes* v. *Barnes*, 53 N. C., 366.

At all events, if the writ of *scire facias*, so far as it removed the disability of dormancy, is rightfully repealed, still it may be used to give notice of a motion for a *ven. ex.* See sec. 10, ordinance of June 23, 1866.

Winston and *Yates, contra.*

The fifth section of the ordinance expressly includes every *scire facias* of every kind. Sections 8 and 9 of that ordinance may be unconstitutional, but they show the intent of the Convention in section 5, which is not unconstitutional. *Parker* v. *Shannonhouse, ante*, 209.

It is against public policy that levies should hold always, as titles to land ought not thus to be secretly clogged.

A *sci. fa.* can not be treated as a motion, for it is a suit with regular pleadings and practice.

PEARSON, C. J. From the view taken of the (293) question in *Mardre* v. *Felton, ante*, 279, it can make no difference whether the order of sale be asked for simply on notice, as in that case, or on what purports to be a writ of *scire facias* to show cause why a writ of *ven. ex.* should not issue, as in this. The object is to give the defendant a day in court, in order to show that the judgment has been satisfied; and that is answered as well in the one mode as in the other.

There is error.

PER CURIAM. Judgment reversed, and judgment of *procedendo* awarded.

Cited: Overton v. *Abbott, post*, 294.

M. J. OVERTON v. WILLIAM R. ABBOTT.

Where a *scire facias* to enforce the levy of an execution had been dismissed in the County Court: *Held*, that it was proper for the Superior Court, upon reversing that order, to award a *procedendo.*

(*Mardre v. Felton, ante*, 279, *Riddick v. Hinton, ante*, 291, and *Morehead v. R. R.*, 52 N. C., 500, cited and approved.)

SCIRE FACIAS, tried before *Warren, J* , at Fall Term, 1866, of the Superior Court of Camden.

The case here came up by appeal from the County Court. The plaintiff had obtained a judgment for $992 against the defendant at September Term, 1861, of the County Court, and a *fi. fa.* issuing from that term had been levied upon land and returned to September Term, 1862. Afterwards a writ of *sci. fa.* was issued, returnable to June Term, 1866, requring the defendant to show cause why the plaintiff should not have his execution, etc. At September Term, 1866, upon motion, this writ was dismissed.

(294) Upon appeal to the Superior Court, his Honor overruled the motion to dismiss, and ordered a *procedendo* to issue to the County Court, etc. Whereupon, the defendant appealed to the Supreme Court.

Bragg, for the appellant.

The order for a *procedendo* to the County Court was erroneous, for the whole case had been brought up into the Superior Court. *Shoffner* v. *Fogleman*, 44 N. C., 280; *Evans* v. *Governor's Creek Co.*, 50 N. C., 331; *Morehead* v. *Railroad*, 52 N. C., 500; *Purvis* v. *Robinson*, 49 N. C., 96.

No counsel for the appellee.

PEARSON, C. J. The merits of the case being disposed of in *Mardre* v. *Felton*, *ante*, 279, and (treating this as a motion, after notice, for an order to sell the land levied on); also in *Riddick* v. *Hinton*, *ante*, 291, Mr. Bragg insists there is error in awarding a *procedendo* to the County Court.

We do not concur in that view. The appeal from the County to the Superior Court did not bring up the whole case, but only the motion for an order of sale, leaving the original judgment and levy in the County Court, to which court the sheriff must make return, in order to have satisfaction of the judgment entered there.

We are, therefore, of opinion that the further proceedings should be had in the County Court, and that it was proper to award a *procedendo*. *Morehead* v. *Railroad*, 52 N. C., 500.

PER CURIAM. Judgment affirmed. Motion for an order of sale should be allowed. Issue a writ of *procedendo*.

(295)

SAMUEL R. BUNTING v. PHILIP J. WRIGHT.

1. The effect of the Act, ch. 63, s. 1, of the Laws of 1866-'67, is to abolish imprisonment for debt in all cases.
2. Where an issue of fraud, on a *ca. sa.* in the County Court, was found against the defendant and he appealed to the Superior Court, and upon being called failed to appear: *Held*, that the act abolishing imprisonment for debt rendered it proper for the Judge to refuse to give judgment on the appeal bond, it being in this case in the nature of a bail-bond.
3. In such cases, as the law has put an end to the object of litigation, each party must pay his own costs.

MOTION for judgment on an appeal bond, heard before *Fowle, J.*, at Spring Term, 1867 of the Superior Court of New Hanover.

The defendant had been arrested upon a *ca. sa.* from the County Court of New Hanover, and at September Term, 1859, of that court, issues of fraud were made up, and upon trial by a jury he was found guilty of fraud and concealment. From the judgment in that court the defendant appealed to the Superior Court, when the cause was continued till Spring Term, 1867. At that term the defendant was called and failed, and the plaintiff prayed judgment upon the appeal bond. His Honor declined to grant the judgment, and the plaintiff appealed.

Person for the appellant.
No counsel for the appellee.

PEARSON, C. J. By the Act of 1866–'67, chap. 63, sec. 1, entitled "An act to abolish imprisonment for debt," it is enacted: "From and after the passage of this act it shall not be lawful to arrest or imprison any person upon an original writ for debt, etc., issuing out of any court of record, or upon any warrant issuing from any justice of the peace, nor upon *capias ad satisfaciendum* issuing from any court of record, or from any justice of the peace."

(296) If the word "imprison" had not been used in the act, some question might have been made as to its application to cases where a debtor had been arrested and was in prison, or out on bail at the date of the passage of the act. We must reject that word or hold that the act was to be general in its application, and that the intention was to abolish all imprisonment for debt from and after the passage of the act.

We concur in opinion with his Honor that no judgment could be rendered on the bail bond, which is the nature of the bond given in this case. The securities had no right to arrest or imprison their principal after the passage of the act, in order to surrender him, and the sheriff would have had no right to imprison him; so the condition was made impossible by the act of law, and the bond is saved.

In this case an issue of fraud had been made up. It is provided, Rev. Code, chap. 59, sec. 14, "if, on the trial, the jury shall find that there is any fraud or concealment, etc., the debtor shall be deemed in custody of the sheriff, and shall be adjudged to be imprisoned," etc. But by the Act of 1866–'67, sec 3, "all laws and clauses of laws coming in conflict with this act are hereby repealed"; so, if the debtor had made his appearance and a trial had taken place, and a verdict finding fraud been entered, the court could not have adjudged that he be imprisoned. *Cui bono*, require him to appear and go through the useless and expensive form of a trial, as the plaintiff could not have the fruit of a verdict in his favor?

On the whole, as the object of the litigation has been put an end to by the act of law, all such cases must go off by something like an abatement: that is, be dismissed, each party paying his own costs, as was the case of actions when slaves were the only subject of the litigation, after their political death.

In this age of innovation, when there are no (297) ancient paths, the courts are obliged to make new ones, in order to carry into effect the will of the law-making power.

It was urged on the argument that the act can not open the jail doors *proprio vigore*, and there must be some formal mode of discharging debtors who are in jail. It would seem in such cases that a writ of *habeas corpus* would apply, so as to have it adjudged that the debtor was entitled to the benefit of the act, unless the creditors consent to his being turned out without such proceedings. However, that question is not before us.

There is no error.

PER CURIAM. Judgment affirmed.

Cited: McKay v. *Ray*, 63 N. C., 46; *Holmes* v. *Sackett*, *Id.*, 60; *White* v. *Robinson*, 64 N. C., 701.

JUDSON D. GRISSETT v. ALVA SMITH.

When a final judgment is rendered in the Supreme Court upon an appeal from a final judgment in the Superior Court, the latter court has power to issue no other process in the case than an execution for its own costs.

MOTION, for an execution for costs, and a writ of re-restitution upon a certificate of the judgment of the Supreme Court, in a case of forcible entry and detainer, before *Fowle, J.*, at Spring Term, 1867, of the Superior Court of Columbus.

This case was before this court at the last term (*ante*, 164), upon an appeal from a judgment of the Superior

Court of Columbus, at Fall Term, 1866, quashing the proceedings before the justices and ordering a writ of re-restitution for the plaintiff in the *recordari*, by which the proceedings were carried up. The judgment of the court below was affirmed by the Supreme Court, with costs.

The certificate of the decision having been transmitted to the Superior Court, the plaintiff's counsel (298) made the motions, as above, for an execution for costs, and a writ of re-restitution. It appeared from the record that the plaintiff's term in the premises expired January 1, 1867, and his Honor refused to grant the writ, assigning that as his reason for the refusal. The motion for execution for costs was allowed. The plaintiff appealed.

Person, for the appellant.
Moore, *contra*.

1. The court below, to which the decision of the Supreme Court was certified, exercised all its powers when it ordered execution to issue for the costs incurred in that court. Rev. Code, chap. 33, secs. 6 and 21.

2. But if the court below had possessed the power to order a writ of re-restitution, it should not have exercised it.

3. The plaintiff's term had expired, and with it the right of possession. *Wilson* v. *Hall*, 35 N. C., 484; *Watson* v. *Trustees F. College*, 47 N. C., 211; Bac. Abr., F. & D.—G.

To ask of the law to be now re-possessed of land which the petitioner admits is no longer his, but belongs to another, is a plain request of the law to justify what it forbids, namely, entries into land without title. The plaintiff's case begins with a prayer to be allowed to keep his own land, and ends with a prayer to be allowed to enter on the lands of another!

BATTLE, J. The refusal of his Honor in the court below to order the issue of the writ of re-restitution was

right and proper; but not for the reason assigned by him. The first appeal took the whole case to the Supreme Court, and the judgment rendered therein was final; and any execution, or process in the nature of an execution. except for the costs incurred in the Superior Court, must issue from the Supreme Court. The certificate of the decision of that court in the present case was transmitted to the Superior Court by virtue
(299) of the provision contained in the Rev. Code, chap. 33, sec. 21, for the purpose of having the costs of the latter court taxed therein, and an execution therefore issued therefrom. Any other execution upon a final judgment in the Supreme Court must issue in the first instance from that court, though it may, in the discretion of the court, be made returnable to the Superior Court, which may enforce obedience to it, and may, if necessary, issue new or further execution or process thereon. See Rev. Code, chap. 33, sec. 6.

When the appeal to the Supreme Court is from an interlocutory judgment at law of a Superior Court, the former court can not enter any judgment reversing, affirming or modifying the judgment so appealed from, but must cause its decision to be certified to the court below, with instructions to proceed upon such judgment, or to reverse or modify the same, according to the said opinion; and the court below shall enter upon its records the opinion at length, and proceed in the cause according to the instructions. See Rev. Code, chap. 33, sec. 14.

In the case now before us the first appeal was from a final, and not an interlocutory, judgment of the Superior Court, and the judgment of this court on such appeal was final. The motion for the writ of re-restitution ought to have been made here, and not in the Superior Court, which, as indeed appears from the certificate sent down to it, had no authority to issue any execution except one for the costs of that court.

The judgment from which the present appeal was taken must be affirmed.

Per Curiam. Judgment affirmed.

Cited: *Murrill* v. *Murrill*, 90 N. C., 123.

(300)

Doe ex. dem. JAMES M. McCORKLE v. WILSON EARNHARDT.

A purchaser for value without notice, under a deed in trust in which some of the debts secured are fictitious, gets a good title, even against the creditors of the fraudulent trustor.

(*Shober v. Hauser*, 20 N. C., 91, and *Brannock v. Brannock*, 32 N. C., 428, cited and approved.)

Ejectment, tried before *Fowle, J.*, upon a case agreed, at Spring Term, 1867, of the Superior Court of Stanly.

The lessor of the plaintiff claimed title to the land in dispute by virtue of a deed from the administrator of Evan Stoker, deceased, executed under a decree of the County Court in a petition to make real estate assets. Evan Stoker claimed under a deed made by the trustee in a deed in trust executed by John Stoker. The deed in trust was executed and registered in March, 1856, and some of the debts mentioned as secured by it were fictitious, others were *bona fide*. Neither the trustee nor Evan Stoker, at the time of the purchase by the latter, was aware that any of the debts were feigned; and the sale was for valuable consideration.

The defendant claimed through one Kirk, a creditor of John Stoker, but not secured in the deed in trust. Kirk had bought at execution sale under a judgment obtained after the registration of the deed in trust.

Upon these facts his Honor instructed the jury to find for the plaintiff. Verdict accordingly. Judgment, and appeal by the defendant.

No counsel for the appellant.
Phillips & Battle, contra.

1. A deed in trust securing debts, as well *bona fide* as fictitious, is not void. *Brannock* v. *Brannock*, 32 N. C., 428.

2. Since the Act of 1842, Rev. Code, chap. 50, (301) sec. 5, a purchaser for value and without notice gets a good title even if the deed authorizing the sale embraces covenous debts only.

Reade, J. The question involved in this case is whether a purchaser for value and without notice, under a deed in trust which secures debts, some of which are fictitious, obtains a good title as against the creditors of the fraudulent trustor.

The case of *Shober* v. *Hauser*, 20 N. C., 91, decides that a purchaser without notice under a deed to secure a usurious debt gets no title. *Brannock* v. *Brannock*, 32 N. C., 428, is much to the same effect, except that the latter case sustains the validity of such a deed where some of the debts secured are *bona fide.*

After the decision in the case of *Shober* v. *Hauser*, and probably in consequence of it, an act was passed to save purchasers without notice under fraudulent trusts. Rev. Code, chap. 50, sec. 5. That act provides that no conveyance, or mortgage made to secure the payment of any debt, or the performance of any contract, shall be deemed void, as against a purchaser for valuable or other good consideration, by reason that the consideration of said debt is unlawful, if the purchaser had no notice of the unlawful consideration. This statute, and the case of *Brannock* v. *Brannock*, are decisive of this case.

There is no error.

Per Curiam. Judgment affirmed.

(302)

STATE v. FRANKLIN SMITH.

1. After verdict the defendant can not object that evidence was improperly admitted, if he did not except when it was introduced.
2. The opinion of medical experts is admissible as to the age of a child upon whom the crime of "carnally knowing," etc., under the statute, Rev. Code, c. 34, s. 5, is charged.
3. An indictment under that statute need not charge that the prisoner ravished the child.

INDICTMENT under the statute, Rev. Code, chap. 34, sec. 5, for carnally knowing and abusing a female child under ten years of age, tried before *Meares, J.*, at April Term, 1867, of the Criminal Court of New Hanover.

The jury found a verdict of guilty. Motion in arrest of judgment. Motion overruled. Rule for a new trial. Rule discharged. Judgment of death, and appeal.

The facts sufficiently appear in the opinion of the court.

Attorney-General, for the State.
No counsel for the defendant.

READE, J. Under the statute it is a felony punishable with death to "unlawfully and carnally know and abuse any female child under the age of ten years." Of this crime the prisoner has been convicted, and the enormity of the crime has only made us the more careful to see that his conviction was proper.

There was evidence offered tending to show that the child, upon whom the crime was alleged to have been committed, was under ten years of age. There was no objection to this evidence until after the jury returned their verdict. The prisoner then excepted to the evidence. The exception came too late, and could not avail the prisoner if it were clear that the exception would have been sustained if taken in apt time. But the exception could not be sustained if it had been (303) taken in apt time. It seems that the exact age of the child was not known, and two medical experts were examined and gave their opinion that she was under ten years of age. We think that this was proper.

The prisoner asked his Honor to charge the jury that there was no evidence of sufficient penetration to constitute the crime.

His Honor could not have charged that there was no evidence of penetration, for there were the declarations to that effect of the child herself, and the opinions and statement of facts by two experts; and his Honor charged the jury that actual penetration was necessary to constitute the crime, but that no particular depth of penetration was necessary.

There are no grounds for a *venire de novo.*

The prisoner moved in arrest of judgment, because the indictment did not charge that the prisoner did ravish the child. It was not necessary so to charge. If the consent of the child had been proved, it would have availed the prisoner nothing. The offence consists not in ravishing, but in carnally knowing and abusing the child. There is no ground to arrest the judgment.

There is no error in the record.

Let this opinion be certified to the Criminal Court of Law of New Hanover, that said court may proceed to judgment and execution according to law.

PER CURIAM. There is no error.

Cited: State v. *Ballard,* 79 N. C., 629.

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(304)

WILLIAM P. MOORE v. ALEXANDER MITCHELL and THOMAS J. MITCHELL.

In an action sounding in damages, for an unliquidated money demand, a judgment by default final is irregular, and on motion will be set aside.

MOTION to set aside a judgment by default final, heard before *Mitchell, J.,* at Spring Term, 1867, of the Superior Court of Craven.

An action of assumpsit, for an unliquidated money demand, was brought by the plaintiff against the defendants to Spring Term, 1866. The cause was continued to Fall Term, when, the defendants not appearing by attorney or in person, judgment final by default was entered against them "for $11,160.49, of which $9,233.39 is principal money." This judgment was rendered on Saturday afternoon of the term, his Honor having instructed the attorneys of the court to enter judgments in plain cases, and it did not appear that he was on the bench when it was entered. Execution was issued upon the judgment, but was afterwards stayed by a writ of injunction.

The motion to set aside the judgment was allowed, and the plaintiff appealed.

Haughton, for the appellant.
Graham and *Strong*, *contra*.

The judgment was contrary to the course and practice of the court. Rev. Code, chap. 31, sec. 57 (2) and sec. 91; Steph. Pl., 105; *Hartsfield* v. *Jones*, 49 N. C., 309; *Williams* v. *Beasley*, 35 N. C., 112.

Therefore, being irregular, it should be set aside. *Winslow* v. *Anderson*, 19 N. C., 9; *Powell* v. *Jopling*, 47 N. C., 400; *Bender* v. *Askew*, 14 N. C., 149; *White* v. *Albertson*, *Ibid.*, 241; *Crumpler* v. *Governor*, 12 N. C., 52; *Andrew* v. *Devane*, 3 N. C., 373; *Williams* (305) v. *Beasley*, 35 N. C., 112; *Keaton* v. *Banks*, 32 N. C., 381; *Davis* v. *Shaver*, *ante*, 18; *Sharp* v. *Rintels*, *ante*, 34; *Whitley* v. *Black*, 9 N. C., 179; *Pettijohn* v. *Beaseley*, 18 N. C., 254.

READE, J. An irregular judgment may be set aside at a subsequent term. An irregular judgment is one contrary to the course and practice of the court.

The exigency of the writ was to "answer the plaintiff of a plea of trespass on the case to his damage fifteen thousand dollars"—unliquidated damages.

The judgment was: "The defendants failing to appear, judgment final by default is entered against them for $11,160.49, of which $9,233 is principal money."

At the next term the defendants moved to set aside the judgment, and the motion was allowed. The question is, Had the court the power to set aside the judgment?

Our statute, Rev. Code, chap. 31, sec. 57, provides that upon failure of the defendant to appear and plead, the plaintiff may have judgment by default, which, in actions of debt, shall be final, unless where damages are suggested on the roll; and in that case, and in all others not specially provided for, where the recovery shall be in damages, a writ of inquiry shall be executed at the next term. At the appearance term it would have been regular, and according to the course and practice of the court, to enter judgment by default (the defendant not appearing), and award a writ of inquiry to be executed at the next term, when a jury would pass upon the damages, and the court render judgment upon the verdict. Here the case was not submitted to a jury at all, but the court ascertained the damages and gave final judgment. This was certainly irregular, and the judgment was properly set aside.

In justice to the learned Judge who presided, it is proper to say that under leave given to the attor-
(306) neys to enter judgment in plain cases, the plaintiff's attorney, by mistake, entered up the irregular judgment. By plain cases the Judge doubtless meant such cases as are enumerated in section 91 of said statute.

There is no error.

PER CURIAM.

Cited: Foard v. *Alexander*, 64 N. C., 70.

SAMUEL T. STANCILL v. JOSEPH F. BRANCH.

1. Where the defendant in an execution had conveyed all his property, real and personal, to a third person: *Held*, that the plaintiff had a right to direct the officer to levy upon the real estate before the personalty.
2. A defendant may, expressly or by implication, waive the right to have his personal estate levied upon before his real estate, and a fraudulent conveyance of all his estate will amount to such a waiver.

(*Sloan v. Stanly*, 33 N. C., 627, cited and approved.)

MOTION to amend a constable's return upon an execution, and for a *ven. ex.*, heard before *Barnes, J.*, at Spring Term, 1867, of the Superior Court of Northampton.

The case has already been before this court. See *ante*, page 217. Upon coming before his Honor at the last term of the Superior Court, it appeared that previously to the levy (which was one of several, amounting in all to some $1,500), the defendant had told the plaintiff that he had sold all his property to one Goodwyn; also, that in December, 1865, and again about the 1st of May, 1866, the defendant had made conveyances of all his property to Goodwyn, neither of which, from some formal defect, had been registered. That on the 3d July, 1866, he made another such conveyance, which was registered. At the time of the levy the defendant had in his possession some $1,500 worth of personal property, consisting of horses, cattle, furniture, etc., (307) which had been included in his conveyances, also a yoke of oxen, not so included. After hearing this evidence the court allowed the officer to amend his return, which he did, in the following words: "In consequence of a conversation had with the plaintiff, in which he said there was doubt whether the personal property in the possession of the defendant was his, as he, the defendant, had told him, plaintiff, that he had sold it, and he, plaintiff, did not wish to have to give me a bond of indemnity; in which said conversation plaintiff directed me not to levy upon personal property, but upon the land, I have not gone to the defendant's house to look for goods and chattels upon which to levy, but have levied this execution upon the following lands (describing them), June 9, 1866." Thereupon the court ordered a *ven. ex.* to issue to sell the lands levied on, and the defendant appealed.

Bragg, for the appellant.

Constable must first levy on personal estate, and if he do not so levy, his return must show that it was for want of goods and chattels. *Henshaw* v. *Branson*, 25 N. C., 298; *Jones* v. *Austin*, 32 N. C., 20.

In *Sloan* v. *Stanly*, 33 N. C., 630, it appeared that the officer did not know that the defendant had goods. Here it was known to him.

Rogers & Batchelor, and *Peebles*, *contra.*

1. The conduct of the defendant in regard to his property amounts to an estoppel *in pais* to assert, as against the plaintiff, that he had personal property that might be levied upon. See *Bird* v. *Benton*, 13 N. C., 179; *Pickard* v. *Sears*, 33 Com. Law., 115; *Mason* v. *Williams*, 53 N. C., 478; *Hearne* v. *Rogers*, 13 Com. Law, 449; *Graves* v. *Key*, 23 Com. Law, 79, 4 Kent, page 268, n. (c), 7th Ed. Phil. & Amos Ev., 378.

2. At least it is a waiver of his privilege to have (308) his personal estate taken first. *Sloan* v. *Stanly*, 33 N. C., 627; *Tyser* v. *Short*, 50 N. C., 279. See also *Jones* v. *Austin*, 32 N. C., 20, as to presumptions in favor of the order below.

3. The usual words, "For want of goods and chattels," do not constitute a legal formula, but may be supplied by expressions equivalent, or by any that satisfy the requirements of the law in regard to levies upon realty and personalty. Compare *Henshaw* v *Branson*, 25 N. C., 298, with *Tyser* v. *Short*, *Sloan* v. *Stanly*, and *Jones* v. *Austin;* also see Rev. Code, chap. 62, sec. 16;

Smith v. *Low*, 24 N. C., 457; *Blanchard* v. *Blanchard*, 25 N. C., 105.

BATTLE, J. In the case of *Sloan* v. *Stanly*, 33 N. C., 627, it was decided that where an execution is about to be levied by a constable, the debtor, if he has personal property, must show it, and, if he do not, the officer commits no wrong by levying on the land in the first instance. So, if it do not appear that the officer knew of the existence of the personal property, he is justifiable in levying on the real estate. The present case differs from the one referred to, in the fact that the officer knew that the debtor was in the possession of goods and chattels, as well as of lands; but he was informed, and had good reason to believe that the debtor had conveyed, or was endeavoring to convey, all his property, both real and personal, to a third person. The plaintiff in the execution had the right to test the validity of that conveyance; and we think he had the option to select which kind of property should be levied on, for the purpose of trying the title. It is manifest that less difficulty would be encountered by a levy upon the land than upon the personal property of the debtor; and, according to the facts stated in the constable's return, the court was authorized to grant the order for a *venditioni exponas*.

It is very certain, we think, that a debtor may, if he prefer to keep his personal property, request the (309) officer to levy upon his land, and the officer will be justified in so doing, and stating the request in his return. So, in our opinion, an attempted fraudulent conveyance of all his property by a debtor will amount to a waiver of his right to have his personal property taken in preference to his land, and the officer may levy, in the first instance, upon the land and make his reason known in his return. The right to have his personal property taken and sold before his realty is intended as a benefit to the debtor, and there is no reason why he may not waive, or forfeit it. In either case where the facts are made known to the court, in the return of the officer, the court may proceed to act upon it, and order the sale for the land for the satisfaction of the debt.

PER CURIAM. Judgment affirmed.

JAMES BROOKS v. CALVIN TUCKER and others.

A report of commissioners under c. 40 of the Revised Code, (Draining Lands), which fails to assess and apportion that part of the labor which, under s. 10, is to be contributed by the defendants, is fatally defective.

EXCEPTION to a report under a petition for a canal to drain lands, heard before *Barnes, J.*, at Spring Term, 1867, of the Superior Court of Pitt.

The petition was filed to August Term, 1866, of the County Court of Pitt, and set forth that the petitioner was the owner of swamp land that could be drained only through the lands of the defendant Tucker, and that the canal into which it was proposed to discharge the one prayed for, after leaving Tucker's land, ran through the lands of the other defendants.

The prayer was in the usual form.

Commissioners having been appointed, reported (310) to the next term that they had laid off a canal as above specified, and assessed the labor to be contributed by the petitioner, but omitted to make an assessment of that to be contributed by the defendants.

An exception was taken to the report by the petitioner, on account of the omission above mentioned. This was overruled in the County Court, but upon appeal was sustained by his Honor. Thereupon the defendants appealed to this court.

No counsel for the appellant.
Haywood, contra.

BATTLE, J. In the fortieth chapter of the Revised Code, entitled "Draining and Daming Low Lands," there is a provision (sec. 8) enabling the proprietor of any low or flat lands to drain them by cutting a ditch or canal into a canal belonging to other persons. The ninth section prescribes that such owners shall be made parties-defendant to the petition required by previous sections, and proceeds to point out the manner and terms in and under which it may be done. The tenth section requires that the commissioners, who may have been appointed to determine the route of the proposed ditch or canal, and its width, depth, etc., shall, besides the damages which they may assess against the petitioner for the privilege of draining into the canal of other persons, 'assess and apportion the labor which the petitioner and defendants shall severally contribute towards repairing the canal or canals, into or through which the petitioner drains the water from his lands, and report the same to court, which, when confirmed, shall stand as a judgment of the court against each of the parties, his executors and administrators, heirs and assigns."

In the case now before us, the commissioners, having acted, made a report, in which they assessed the (311) proportion of the expenses which the petitioner should bear in clearing out the canal into which his ditch or canal drained, but omitted to assess the defendants, or any, or either of them, with any part of such expenses. For this, as well as for some other matters, the petitioner excepted to the report, and moved to have it set aside. This motion was refused in the County Court, but, upon appeal, was sustained in the Superior Court, and, from the order of the latter, the case comes by appeal before us.

It is manifest that the requirement of the tenth section of the act is of vital importance to the parties. Without it, the petitioner has no means of enforcing the performance by the defendants of the work and labor, without which the canal into which he drains may become useless, or perhaps a nuisance. The omission of it, then, in the report of the commissioners must be deemed fatal, and the report ought to be set aside.

The order made in the Superior Court must be affirmed, and this must be certified to that court, to the end that a writ of *procedendo* may issue to the County Court, directing them to set aside the report of the commissioners and proceed with the cause.

PER CURIAM. Ordered accordingly.

(312)

THE STATE v. ARCHIBALD KNOX.

1. Although one believes the allegation to which he testifies, yet unless he has probable cause for such belief, he may be convicted of perjury.
2. Although it be error to charge that the doctrine of "reasonable doubt" does not apply in trials for misdemeanors, yet where the instructions taken altogether gave the prisoner the benefit of that doctrine, and informed the jury that they must be "fully satisfied" before convicting: *Held*, that there was no error.

(*State v. Sears, ante,* 146, cited and approved.)

PERJURY, tried before *Barnes, J.*, at Spring Term, 1867, of the Superior Court of Johnston.

It appeared that upon an indictment for assault and battery, tried at Fall Term, 1866, of Johnston Superior Court, one Allen had been examined as a witness, and that thereupon, on the same trial, the present defendant was called and swore that "he knew the general character of Allen for truth, and that it was bad."

It also appeared that Allen's general character for truth was good, and the question arose whether Knox had sworn the contrary wickedly, knowingly, etc. Upon this point much testimony was introduced upon both sides.

The court charged the jury that if it had been proved fully to their satisfaction that the defendant testified as charged in the indictment, and that he believed it, yet if he had no probable cause for such belief, and might with little trouble have ascertained the contrary, he would be guilty.

The court was asked, on behalf of the defendant, to charge that the jury must be satisfied, beyond a reasonable doubt, before they could convict, but it declined to do so, on the ground that doctrine did not apply except in capital felonies; that the rule here was, They should be satisfied as reasonable and conscientious men to the extent that they could rest quietly and (313) conscientiously upon the recollection that they had convicted a guilty man, and if not fully satisfied to this extent and degree, they should acquit.

Verdict, Guilty. Rule for a new trial. Rule discharged. Judgment, and appeal.

Badger, for the State.
No counsel for the defendant.

READE, J. His Honor's instructions to the jury, as to what constitutes perjury, are well sustained by the authorities. It is not true that there can be no perjury where a man believes what he swears. He ought, at least, to have probable cause for his belief. If a man swear to a matter, of which he has no knowledge, although he believes it to be true, and although it turns out to be true, it is perjury; for, where there is this kind of rashness and corruption, the law implies malice. 6 Binny, 240.

His Honor was asked to charge the jury that they must be satisfied beyond a reasonable doubt before they could convict, and he declined to give the instruction, saying that it did not apply to misdemeanors, but only to capital felonies. If his Honor had stopped there we should feel obliged to grant a *venire de novo*, as we have no hesitation in saying that the certainty to which a jury should be brought before rendering a verdict of guilty is the same for all grades of criminal offences.

What amount of evidence in any particular case will remove reasonable doubt is a question solely for the jury, and will be met by the parties with more or less success, as they know more or less of human nature in general, or of the particular temper of the jury before them. Whatever be the difficulty involved in it, it is not met by any rule of law. In one case it may be simply the greater improbability of the commission of such an offence that will suggest the necessity of introducing more evidence than in a different case. (314)

As an example of this we see that in practice some misdemeanors require more evidence than others, although, as regards punishment, of the same grade; more than this, assaults have been charged that were of an enormity so great as to demand for their proof more testimony than in some cases probably would have secured a conviction of murder. So, again, a knowledge of the consequences of a conviction to the prisoner, may of itself arouse in the jury so keen a sense of their responsibility to the truth as reasonably to induce the prosecutor to add other evidence to what would have sufficed for a conviction in a case of less consequence. For instance, as a matter of law it is not easy to say why a charge of horse-stealing should require more evidence for its establishment now than it did before the passage of the late act rendering it capital; yet in practice it may be safe to presume that it will.

Observations of this sort should not be confounded with the rule which defines the amount of effect which must be produced upon the minds of the jury in order to justify conviction. Whatever be the charge, the law requires that the evidence shall produce that result which very commonly is described as involving an absence of "reasonable doubt," but which may be denoted as well by other language; as, for instance upon the whole, by that which here has been employed by the court below. We have taken occasion recently to say that there is no formula in the phrase "reasonable doubt." *State* v. *Sears*, *ante*, 146. What is demanded is that the jury shall be fully satisfied of the truth of the charge, due regard being had to the presumption of innocence (a presumption for all grades of offences), and to the consequent rule as to the burden of proof.

Let this be certified, etc.

PER CURIAM. There is no error.

Cited: Emry v. *Parker*, 111 N. C., 266; *State* v. *Rogers*, 119 N. C., 796; *State* v. *Brabham*, 108 N. C., 797; *State* v. *Debnam*, 98 N. C., 718; *State* v. *Parker*, *post*, 477.

(315)

WILLIAM J. BINGHAM, and sons, v. PHARAOH RICHARDSON. and others.

The Ordinance of the Convention of June, 1866, entitled "An Ordinance to change the jurisdiction of the courts and the rules of pleading therein," is general, and applies to writs of *sci. fa.* from the Supreme Court, as well as those from the County and Superior Courts.

(*Parker v. Shannonhouse, ante*, 209, cited and approved.)

SCIRE FACIAS, issued from January Term, 1867, to the present term of this court, upon a judgment rendered at June Term, 1864, on which only one writ of execution (returnable to December Term, 1864), had been issued.

Phillips & Battle, for the plaintiffs.
Rogers & Batchelor, for the defendants.

PEARSON, C. J. We are of opinion that the fifth section of the Ordinance of the Convention (June, 1866, chap. 19), applies to a *sci. fa.* issuing from the Supreme Court as well as from the other courts.

The words are broad enough to embrace process of this court, and the supposed mischief which it was made to remedy is the same. So although the Supreme Court is not named in so many words in any clause of the ordinance, yet a fair construction brings the court within the meaning of the ordinance. The caption, "An Ordinance to change the jurisdiction of the courts and the rules of pleading therein," is general. The first section is also general: "The jurisdiction of the several courts of the State and of the justices of the peace, except as provided in this ordinance, shall be as in the year 1860." So the fifth section is general: "Dormant judgments shall only be revived by actions of debt, and every *scire facias* to revive a judgment shall be dismissed on motion." The fact that the Superior (316) Courts and the County Courts are expressly named in the ordinance, is not sufficient to take the Supreme Court out of the general words; for the special provisions and restrictions contemplated in reference to these courts made it necessary to name them, and there was no such necessity to name this court, although it was meant to bring it within the general provisions.

Under the authority of *Parker* v. *Shannonhouse*, *ante*, 209, the motion to dismiss is allowed. The plaintiff must resort to an action of debt in the Superior Court.

Since delivering the opinion in *Parker* v. *Shannonhouse*, by accident I met with a passage in my Lord Coke, which so fully sustains the reasoning as to induce me to cite it: "This statute is in affirmation, and therefore it restraineth not the common law; but the party may waive the benefit of the *scire facias* given by this act, and take his original action of debt by the common law. 2 Inst., 471, commenting on Stat. 13, Edw. I, chap. 45."

So, the Convention may take away the benefit of the *scire facias*, and leave the party to his original action of debt by the common law.

PER CURIAM. *Sci. fa.* dismissed.

(317)

DANIEL McARTHUR v. HUGH JOHNSON.

1. Where one proposed to convey a tract of land in trust, and his brother undertook to have the deed drawn, but, without the knowledge of the vendor, inserted therein a conveyance also of *another tract in trust for himself*, and, upon presenting the deed for execution, in reply to a question by the vendor, said that it was "all right," whereupon the latter executed it without reading it, or hearing it read: *Held*, that the conveyance of the second tract was valid at law.
2. Distinction between fraud in the *factum*, and other fraud attending the execution of deeds, stated and applied.

(*Logan v. Simmons*, 18 N. C., 13; *Reed v. Moore*, 25 N. C., 310; *Canoy v. Troutman*, 29 N. C., 155; *Gant v. Hunsucker*, 34 N. C., 254; *Nichols v. Holmes*, 29 N. C., 155; *Gwynn v. Hodge*, 49 N. C., 168, cited and approved. *McKerall v. Cheek*, 9 N. C., 343, overruled.)

Trespass, Q. C. F., tried before *Fowle, J.*, at Spring Term, 1867, of the Superior Court of Robeson.

Both parties claimed under one John L. McArthur. As part of his title the plaintiff introduced a deed executed under the following circumstances:

In March, 1853, John L. McArthur, then about twenty-two years of age, contracted to sell a tract of fifty acres of land to the defendant. On the day after, being upon his way to visit the southwest, after some discussion as to the best mode of making the conveyance, one Angus L. McArthur, an older brother of John, suggested that one McCallum, who lived upon the road they were travelling, should write a power of attorney authorizing one Daniel McLean to make the necessary deed in John's absence. On reaching McCallum's, John remained in the buggy, and Angus went into the house. After some time he returned in company with McCallum, bringing a deed, which, in reply to a question by John, he said was "all right." Thereupon John (still sitting in the buggy), without reading it or having it read to him, executed the deed, and then, in company with Angus, continued his journey.

(318) The deed included not only the 50-acre tract, but also one of twenty acres (that in controversy), and authorized McLean to convey the latter to Angus.

This was done without the knowledge or consent of John. By various subsequent conveyances this title to the 20-acre tract vested in the plaintiff.

His Honor charged the jury that if they believed that the execution of the power of attorney was obtained by the fraudulent representation that it authorized a conveyance of only fifty acres of land, whilst, in fact, it also embraced the 20-acre tract, it was void; at least so far as the latter tract was concerned; and that, in such case, no title passed to Angus L. McArthur under the subsequent conveyance by McLean to him.

Verdict, Not guilty. Rule for a new trial. Rule discharged, and appeal by the plaintiff.

Leitch, for the appellant, cited *Logan* v. *Simmons*, 18 N. C., 13; *Reed* v. *Moore*, 25 N. C., 310; *Canoy* v. *Troutman*, 29 N. C., 155; *Gant* v. *Hunsucker*, 34 N. C., 254; *Devereux* v. *Burgwyn*, 33 N. C., 490; *Nichols* v. *Holmes*, 46 N. C., 360; *Gwynn* v. *Hodge*, 49 N. C., 168; also 2 Bl., 295, *Ibid.*, 309, n. 30, and distinguished from the present case, that of *McKerall* v. *Cheek*, 9 N. C., 343.

No counsel, *contra*.

Battle, J. The decision of this case depends upon the question whether the fraud alleged to have been practiced upon John L. McArthur, in the execution of the power of attorney to Daniel McLean, under whom the plaintiff claims, was a fraud in the *factum* of the deed, or a fraud in the consideration of it, or in some matter collateral to it. It is a well established distinction that, for a fraud of the first kind, the deed may be avoided at law, while for a fraud of either of the (319) two last kinds relief can be had only in a Court of Equity. *Reed* v. *Moore*, 25 N. C., 310; *Canoy* v. *Troutman*, 29 N. C., 155; *Gant* v. *Hunsucker*, 34 N. C., 254; *Nichols* v. *Holmes*, 46 N. C., 360; *Gwynn* v. *Hodge*, 49 N. C., 168; *Logan* v. *Simmons*, 18 N. C., 13.

An instance of fraud in the *factum* is when the grantor intends to execute a certain deed, and another is surreptitiously substituted in the place of it. See *Gant* v. *Hunsucker* and *Nichols* v. *Holmes*, *ubi supra.* Another instance is afforded by the case of a deed executed by a blind or illiterate person, when it has been read falsely to him upon his request to have it read. 2 Black Com., 304; *Manser's* case, 2 Coke's Rep., 3. These authorities show that the party was fraudulently made to sign, seal and deliver a different instrument from that which he intended, so that it could not be said to be his deed. Several of the cases in our Reports, referred to above, furnish examples of what is meant by fraud in the consideration of the deed, or in the false representation of some matter or thing collateral to it. In all of them it will be seen that the party knowingly executes the very instrument which he intended, but is induced to do so by means of some fraud in the treaty, or some fraudulent representation or pretence. In this category is included the case of a man who can read the instrument which he signs, seals and delivers, but refuses or neglects to do so. Such a man is bound by the deed at law, though a court of equity may give relief against it. In support of this position the authority of Sheppard's Touchstone is directly in point: "If the party that is to seal the deed can read himself, and doth not, or, being an illiterate or a blind man, doth not require to hear the deed read, or the contents thereof declared; in these cases, albeit the deed be contrary to his mind, yet it is good and unavoidable at law; but equity may correct mistakes, frauds," etc. See 1 Shep. Touch., 56 (30 Law Lib., 121).

(320) While coming to the conclusion that the deed in the case now before us is not one which can be avoided at law, we are aware that a different decision was made in the case of *McKerall* v. *Cheek*, 9 N. C., 343. There a sheriff's deed conveyed three hundred acres of land, but it having been proved that he intended to convey only one hundred and twenty, and would not have executed the deed, had not the courses, of which he was ignorant, been inserted in such a way as to deceive him as to the quantity, it was held that the deed

was not conclusive, and that the question ought to have been left to the jury to say whether it was fraudulently obtained; for, of the question of fraud, a court of law had cognizance as well as a court of equity. The case was decided without argument, and no authorities are referred to in support of the opinion of the court. What is more material in lessening the authority of the case, not a word is said about the distinction between fraud in the *factum* of the deed and fraud in the consideration, or in some matter collateral to the deed. That distinction, and the reasons upon which it is founded, in assigning one kind of fraud to the jurisdiction of a court of law, and another to that of a court of equity, seems to have been first noticed and explained in this State in the case of *Logan* v. *Simmons*, 18 N. C., 13. In that case these remarks are found: "The counsel for the plaintiff, however, insisted upon the general observation, that upon questions of fraud, the jurisdiction of courts of law and equity is concurrent. In its generality that position is inaccurate. As to many and most cases it is true; but there are numerous frauds which can be alleged, investigated and relieved against in equity only. Where a conveyance is not avoided by statute, and where the objection is grounded upon imposition in the treaty, and not upon undue and unlawful means used for obtaining the execution—*the factum*, of the particular instrument, relief in equity is most appropriate, and generally can be had there only. (321) A court of equity can do complete justice in such cases by holding the instrument to be a security for what was advanced upon the treaty or done under the contract, while a court of law would be in danger of doing wrong to one of the parties, at all events, by being obliged to pronounce the whole conclusively void or valid, for all purposes." *McKerall* v. *Cheek*, *ubi supra*, affords an instance of what would be the hardship and injustice of allowing the conveyances to be avoided at law; the sheriff's deed would not have conveyed even what the parties intended to convey; and thus innocent persons claiming under him would have been defeated of their just rights; while in a court of equity the instrument would have been avoided only as to the part of the land fraudulently inserted in it. At all events, the court of equity would not have avoided it *in toto*, but would have so moulded it as to do exact justice between the respective parties For these reasons, we are of opinion that the decision in *McKerall* v. *Cheek* can not be sustained, and that his Honor in the court below erred in following that case, instead of the principle of the more recent decisions in this court. The judgment must be reversed, and a *venire de novo* awarded.

PER CURIAM. *Venire de novo.*

Cited: Johnson v. *McArthur*, 64 N. C., 676; *Medlin* v. *Buford*, 115 N. C., 270.

(322)

ROBERT W. MINOR v. JOHN G. HARRIS.

1. Defendants have a right to appeal from an interlocutory order of the County Court appointing four freeholders to view, lay off and value land for a mill site under Rev. Code, c. 71, s. 1.
2. The rule upon this subject contained in the Revised Statutes, and administered in *Brooks v. Morgan*, 27 N. C., 481, has been reversed by the provisions of the Revised Code, c. 4, s. 1.

(*Hunt v. Crowell*, 6 N. C., 424; *Harvey v. Smith*, 21 N. C., 186; *Anders v. Anders*, 49 N. C., 243; *Mastin v. Porter*, 32 N. C., 1, cited and approved.)

MOTION to dismiss an appeal from an interlocutory order in the County Court, heard before *Warren, J.*, at Spring Term, 1867, of the Superior Court of Granville.

A petition had been filed in the County Court of Granville under chap. 71, sec. 1, of the Rev. Code, asking for the condemnation of an acre of land belonging to the defendant for a mill site. The cause having been heard in that court upon the petition, answer and proofs, an order was granted appointing four freeholders to view, lay off and value an acre of land as prayed for. From this order the defendant prayed for and obtained an appeal. In the Superior Court, upon motion, the appeal was dismissed, and the defendant appealed a second time to this court.

Edwards, for the appellant.

The case of *Brooks* v. *Morgan*. 27 N. C., 481, was decided upon the wording of the Rev. Stat , chap. 4, sec. 1, which has been changed by the Rev. Code, chap. 4, sec. 1. Besides, even under the Rev. Stat., in *Burgess* v. *Clark*, 35 N. C., 109, an appeal was allowed.

Moore, contra.

Brooks v. *Morgan* is a decision upon the very point, and is sustained by *Railroad* v. *Jones*, 23 N. C., (323) 24; *Stanly* v. *Watson*, 33 N. C., 124; *Collins* v. *Haughton*, 26 N. C., 420. So far as *Green* v. *Eatman*, 6 N. C., 12, is opposed to this it must be considered overruled. *Burgess* v. *Clark* is distinguishable.

BATTLE, J. The only question presented in this case is whether the defendant had the right to appeal to the Superior Court from the order made in the County Court.

The plaintiff's counsel contends that he had not: First, because no appeal is given in such case, either by the seventy-fourth chapter of the Revised Code, under which the petition was filed, or by the general law concerning appeals, contained in the fourth chapter of The Code; secondly, because the order was not of that kind of interlocutory orders from which an appeal is allowed.

In support of the first objection the case of *Brooks* v. *Morgan*, 27 N. C., 481, is relied upon as an authority directly in point. This decision was made at June Term, 1845, after argument and full consideration, and we consider it as decisive of the question as the law of appeals then stood, notwithstanding that the subsequent case of *Burgess* v. *Clark*, 35 N. C., 109, seems to assume the contrary.

The principle decided was, that no appeal being given in the chapter concerning "Mills and Millers" (Rev. Stat., chap. 74), and the proceedings being summary and peculiar, not according to the course of the common law, but prescribed under peculiar circumstances, the right of appeal was not embraced in the fourth chapter, which declares in the first section, "That when any person, either plaintiff or defendant, or who shall be interested, shall be dissatisfied with the sentence, judgment or decree of any County Court, he may appeal from such sentence, judgment or decree to the next Superior Court," etc. But we think that the corresponding chapter of the Rev. Code (chap. 4, sec. 1), has altered this principle by declaring that "Every (324) free person, whether plaintiff or defendant, who shall be dissatisfied with the sentence, judgment or decree of the County Court, shall be entitled to have, unless the same is expressly forbidden by law, an appeal therefrom to the Superior Court of law," etc. Here the right of appeal is given to parties in the most general terms, unless the same is expressly forbidden by law, which in our opinion was intended to reverse the rule laid down in *Brooks* v. *Morgan*, that, in cases of the kind there mentioned, no appeal should be allowed, unless expressly given by statute. That such was the intention of the Revised Code is still further manifested by the omission in the second section to give an appeal from any order of the County Court relating to Mills, while the corresponding chapter and section of the Revised Statutes gave it in one case, to-wit: when either party "is dissatisfied with the judgment of the court upon the verdict of the jury, rendered upon the petition of any person alleging that he is injured by the erection of a mill." In *Brooks* v. *Morgan* this provision of the Revised Statutes was relied upon as an additional argument to prove that, in controversies about mills, the right of appeal was confined to the single case just mentioned. The omission of a similar provision in the Revised Code, chap. 4, sec. 2, leads us to the conclusion that an appeal from every order, amounting to a sentence, judgment or decree of the County Court, made in the course of any controversy concerning mills, was sufficiently provided for by the terms of the first section.

The second objection to the appeal is that it was taken from an interlocutory order, and not from a final judgment of the County Court. It seemed at one time to have been doubted whether such an objection was not fatal, but it was at an early period settled to the contrary. *Hunt* v. *Crowell*, 6 N. C., 424. In some cases it is not only competent but the proper course for the dissatisfied party to appeal from such an order (*Harvey* v. *Smith*, 18 N. C., 186), and in others, advant- (325) ages otherwise available may be lost by omitting to take such appeal. *Anders* v. *Anders*, 49 N. C., 243. In *Hunt* v. *Crowell* it was said by the court, "That whenever the question presented by the County Court is such that a judgment upon it one way would put an end to the cause, it may be appealed from." This rule has been followed ever since (see *Mastin* v. *Porter*, 32 N. C., 1), and is decisive in favor of the appeal in the present case. Had the County Court refused to make an order condemning the defendant's land, and dismissed the petition, the plaintiff would have had a right of appeal, because as to him it would have been a final judgment; but, as it was made in his favor, it was as to the defendant interlocutory only. But, upon the principle of mutuality, he also ought to be allowed an appeal.

The judgment of the Superior Court must be reversed, and a certificate to that effect must be sent to the court below.

PER CURIAM. Judgment reversed.

(326)

THE STATE upon the relation of OCTAVIA DELOACH v. ANTHONY MARTIN.

1. The rule, that words which, from the context, it is manifest have been omitted in a deed or a will may be supplied by construction: *Held*, to apply also in construing records.
2. Therefore, where a motion had been made by the defendant in the County Court to quash certain proceedings in bastardy, and a counter motion by the State, for a continuance; and the record proceeded thus, "thereupon the court refused to quash, and continued the case to the next Superior Court of Law to be held, etc., etc., without surety by consent:" *Held*, that the record showed sufficiently that the defendant had appealed from the decision upon the motion to quash, and therefore that the cause, upon being carried up, was properly constituted in the Superior Court.

MOTION to remand proceedings in bastardy which had been brought up from the County Court, heard before *Barnes, J.*, at Spring Term, 1867, of the Superior Court of Northampton.

Upon the return of the proceedings before the magistrate into the County Court of Northampton, the defendant's counsel moved to quash because the proceedings did not show an affidavit by the mother, or that the child had been born within three years before the examination. This was resisted by the Solicitor for the State, who also made a counter motion to continue the case, in order that he might have an opportunity to procure an amendment. The County Court record then proceeded: "And thereupon the Court refused to quash, and continued the case to the next Superior Court of Law to be held for the county of Northampton at the court-house," etc., etc., "without surety, by consent."

In the Superior Court the Attorney-General moved to remand the case to the County Court. This motion having been overruled, he appealed.

Attorney-General, for the State.
Bragg, for the defendant.

(327) BATTLE, J. The record of the County Court, as it appears in the transcript sent to the Superior

Court, is manifestly imperfect. Indeed it is senseless and unintelligible as it stands, but may be made intelligible and consistent by interposing the word "appeal" between the words "continued the case" and "to the next Superior Court of Law," etc. In wills and even in deeds it is well settled that a word or words, which it is manifet from the context have been omitted, may be supplied by construction. We can not conceive of any reason why, in a similar case, a word or words may not be supplied by construction in a record. Of course it ought not, and will not be done unless it is clear, beyond doubt, that the word or words were omitted by mistake or inadvertence.

In the present case, the counsel for the defendant moved the County Court to quash the proceedings before the Justice of the Peace for error apparent therein, and at the same time the County Attorney moved for a continuance of the cause, for the purpose of giving an opportunity to the Justice to amend the proceedings before him. The record states that the court thereupon refused to quash, "and continued the case to the next Superior Court of Law," etc. Now, the court had no power to continue the cause to the next Superior Court, but, after refusing to quash the proceedings upon the defendant's motion, it had the power to continue the cause to the next County Court; and it had the power also, and it was its duty, to allow an appeal to the defendant from the refusal to quash, which would, of course, have superseded the order for a continuance. Taking the record all together, it is manifest that the court so acted. But the counsel for the State says that if we supply the word "appeal," it means an appeal from the order to continue the cause, and not from the refusal to quash. This seems to us to be a hypercriticism. The defendant had undoubtedly a right, (328) during the whole term of the court, to appeal from the refusal of his motion to quash; and it is a fair construction of the record that he did appeal therefrom.

If the above view of the record be correct, the cause was properly constituted in the Superior Court, and his Honor did right in refusing the motion of the Attorney-General to dismiss it.

PER CURIAM. Judgment affirmed.

RUSSELL H. KINGSBURY v. WILLIAM H. HUGHES.

1. The provision of the 5th section of the ordinance entitled "An Ordinance to change the jurisdiction of the Courts," etc., in regard to the dismission of pending writs of *sci. fa.*, can not be taken advantage of without motion:
2. Therefore, where the defendant failed to make any defence to a *sci. fa.*, and thereupon judgment was given against him: *Held*, that such judgment was regular and valid.

(*Allison v. Hancock*, 13 N. C., 296, cited and approved.)

MOTION to set aside a judgment, etc., heard at Spring Term, 1867, of the Superior Court of Granville, before *Warren, J.*

At Spring Term, 1863, of that court, the plaintiff had recovered judgment against the defendant for $621. Upon this judgment a writ of *sci. fa.* issued, returnable to Fall Term, 1866; and at that term judgment was taken by default. Thereupon a writ of *fi. fa.* having been placed in the hands of the sheriff, a part of the money was made, and returned with the writ to Spring Term, 1867. At this latter term, after notice to the plaintiff, the defendant's counsel moved to set aside the judgment at Fall Term, 1866, and also the writ of *fi. fa.* issue thereupon upon the ground that the court had no jurisdiction to give such judgment.

His Honor refused to allow the motion, and the defendant appealed.

Graham, for the appellant.

1. The judgment was irregular and void, by the fifth section of the Convention Stay Law.

2. Laches is not attributable to this defendant; for the Convention, acting judicially (*Parker* v. *Shannonhouse*, *ante*, 209), authorized a judgment for costs only, and the court could go no further.

3. The ordinance is remedial, and so, to be construed benignantly. It requires no technicalities of appearance and pleading as in *Davis* v. *Shaver*, *ante*, 18; *Sharp* v. *Rintels*, *Ib.*, 34, and *Crawford* v *Bank*, *Ib.*, 136. The sovereign Convention took cognizance of cases pending in court, and directed what judgments should be entered. The plaintiff, as actor, had either to stop short and discontinue his case or to move to dismiss it at costs of the defendant. Even a confession of judgment would have been void. See *State* v. *Nutt*, *ante*, 20; *Burbank* v. *Williams*, *Ib.*, 37.

Edwards, *contra*.

The dismissal of the *sci. fa.* was a personal privilege of the appellant, and was waived by him. See fifth section of the ordinance; also the opinions in *Griffis* v. *McNeill*, *ante*, 176, and *Crawford* v. *Bank*, *Ib.*, 136.

READE, J. The ordinance of the Convention, entitled "An ordinance to change the jurisdiction of the courts and the rules of pleading therein," provides that "dormant judgments shall only be revived by actions of debt, and every *scire facias* to revive a judgment shall be dismissed on motion, provided that those now issued shall be dismissed at the cost of the debtor."

The *scire facias* in this case was issued before (330) the passage of the ordinance, and the debtor was entitled to have the same dismissed on his motion, and at his cost. He did not move to have it dismissed, and judgment was entered against him. He now insists that he is entitled to have the judgment set aside as irregular and void; that the ordinance was an adjudication, and was mandatory to the court to dismiss the *scire facias* without motion; that the court had no power to render judgment even with the consent of the debtor, any more than a County Court would have the power to render judgment of death for a felony. It is difficult to conceive of any reason why the Convention should have ordained any such arbitrary rule. The parties had a controversy regularly constituted in court. It was not within the power of the Convention to relieve either party from any liability incurred to the other. Possibly it had the power to change the remedy; but why it should arbitrarily change the remedy against the wishes of both parties is not apparent. If it be supposed that it was the purpose of the Convention to favor the debtor, it may be that an arbitrary rule to dismiss the case at his cost, so far from favoring would have very seriously damaged the debtor. Supposed that at the time of the passage of the ordinance a *scire facias* had been pending in court for years, until the cost was more than the debt, and the debtor had a good defence, as payment, and he is anxious to avail himself of this defence, and thereby avoid both the debt and the costs. Here, by this construction, the ordinance cuts off his defence, and directs the court to dismiss the case and make the defendant pay the costs! It ought not to be supposed that the Convention, under the color of favoring a debtor, would thus have trifled with his rights and imposed upon him a heavy liability, not only without his consent, but against his protestation. It is believed to have been the intention of the Convention to favor the debtor so far as could be legitimately done by allowing him, if he thought proper, to come forward (331) and upon his own motion have the *scire facias* dismissed, if he chose to pay the costs for the favor.

The debtor did not so move in this case, and, therefore, it was proper in the court to give judgment on the *scire facias.* It was a regular judgment entered according to the course and practice of the court, and the court, at a subsequent term, had no power to set it aside.

The Act of 1777, Rev. Code, chap 115, sec. 10, provided that no suit should be brought in the Superior

Court for a less sum than one hundred dollars, etc.; and that, if any suit were brought for a less sum, the plaintiff should be nonsuited.

In construing the statute, this court said, "The court does not, *ex officio*, order a nonsuit. It acts only on the defendant's motion to that effect; for it may be that the defendant would prefer the bar of a verdict for a certain sum, to letting the plaintiff at large again; and the provision is not to be construed in favor of the plaintiff, but the defendant only." *Allison* v. *Hancock*, 13 N. C., 296. It will be observed that that statute was in terms mandatory upon the court to nonsuit the plaintiff upon the fact appearing; and that it did not provide that it should be done on motion. Yet the court held that the defendant was not entitled to the benefit of the act, except on his motion. But in the case under consideration, the ordinance provides in terms that the *scire facias* shall be dismissed on motion. And, if the court would require a motion, when the act did not in terms require it, certainly it will require one when the ordinance does in terms require it.

PER CURIAM. There is no error.

Cited: *Brown* v. *King*, 107 N. C, 316.

JOHN D. LIPSCOMB v. MERRITT CHEEK.

A Constable, in whose hands a claim was placed for collection on the 16th March, 1861, and who took no steps to collect till January, 1863, when he collected in Confederate currency, is responsible after a demand in 1866, for the full amount of the claim, notwithstanding the Stay Laws of May and September, 1861.

(*Morgan v. Horne*, 44 N. C., 25, and *Nixon v. Bagley*, 52 N. C., 4, cited and approved.)

DEBT, on a constable's bond, carried up by appeal from a justice's judgment and tried upon a case agreed before *Warren, J.*, at Spring Term, 1867, of the Superior Court of Orange.

On the 15th March, 1861, the defendant, then and for several years afterwards a constable, received from the plaintiff a note payable to a third person and not indorsed, the makers of which were solvent. In January, 1863, in the absence of instructions, the defendant collected the note in Confederate currency, and by mistake settled with another person than the plaintiff. In the month of .... ., 1866, the plaintiff demanded the amount of principal and interest of the note, and upon a refusal to pay the whole amount issued his warrant, under which the plaintiff recovered judgment for the full value of the note, $38.10, with interest.

At the term of the Superior Court, to which appeal was taken, the defendant obtained a rule authorizing him to pay into court $19.25, which covered the value of the currency received by him, with interest and costs to that term. It was agreed that if his Honor should be of opinion with the defendant he should give judgment for the amount so paid in. Otherwise he should give judgment for the full value of the note as above, and for costs.

His Honor was of opinion with the plaintiff, and gave judgment accordingly. The defendant appealed

(333) *Phillips & Battle*, for the appellant.
No counsel, *contra*.

BATTLE, J. We concur in the opinion given by his Honor in the court below, that the plaintiff is entitled to recover the whole amount of his claim. From the facts stated in the case agreed it appears that the defendant received the note in question for collection on the 15th day of March, 1861, and that he did nothing with it until the month of January, 1863. A delay of nearly two years must be regarded as *prima facie* evidence of negligence, and imposes upon the defendant the necessity of an explanation. He accordingly does attempt to account for the delay by the allegation that he was prevented from collecting the claim by the successive stay laws of May and September, 1861. A little attention to dates, considered in connection with the rule of law which applies to collecting officers, will show the invalidity of the excuse.

The claim was put into the defendant's hands on the 15th day of March, 1861, and the first stay law was enacted and went into operation the 11th day of May in the same year. At the ensuing June Term of the Supreme Court that law was decided to be unconstitutional, in the case of *Barnes* v. *Barnes*, 8 Jon., 366; but, in the month of September following, another act was passed which is generally known as the second stay law. The defendant, in the attempt to make good his excuse, is forced to contend that he was not guilty of any neglect by omitting to take any steps to collect between the 15th of March and the 11th of May, and in support of this he relies upon the rule of diligence as laid down in the case of *Morgan* v. *Horne*, 44 N. C., 25. That rule is thus stated: "The degree of diligence to which a constable, acting in the capacity of a collecting agent (under the Act of 1818), is held liable, is that which a prudent man would ordinarily exercise in the management of his own business"; therefore it was held (334) in that case, that the constable was not guilty of negligence by delaying six days to take out a warrant, and five days to take out execution after he had obtained a judgment, it appearing that he had no instructions from the creditor and no ground to suspect the debtor of inability to pay the debt. In the same case it was said that no certain time, within which an officer must proceed, has been or perhaps can be laid down as applicable to all cases. A great variety of circumstances may require the rule to be varied, either extending or shortening the time within which he must act. An officer, when not urged to greater diligence by the creditor, and when there is no apparent danger of the loss of the debt, may, as we have seen, be excused for waiting five days before he takes out a warrant; but we think that total inaction for nearly two months is culpable negligence. No man of ordinary prudence, in the managemnt of his own affairs, would wait so long after he had made up his mind to collect his debt; and an officer must know, from the very fact of a claim being put into his hands, that the creditor wishes it to be collected. It is no sufficient reply to this to say that if the officer had sued out a warrant, he could not have collected the debt before a law was passed to stay it. It can not be certainly known that the debtor would have claimed the benefit of the law, or that he would not have paid the debt to prevent the suit. The creditor had the right to have the benefit of the chance of collection by the action of the officer, and it was negligence in him not to give him that to which he was entitled. This view of the case establishes the liability of the defendant in the present action, and renders it unnecessary to consider the other points presented in the case agreed. A want of due diligence makes the officer liable for the full amount of the claim, to the person who is entitled to receive it. See Rev. Code, chap. 78, sec. 3; *Nixon* v. *Bagley*, 52 N. C., 4.

The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

(335)

ISHAM G. FINCH v. JOHN E. CLARKE.

1. Where two persons claimed a mule adversely to each other: *Held*, that the facts that the defendant prevailed upon the plaintiff to give it into his possession by making an affidavit that it was his, and then put it at work, did not constitute a conversion: *also*, that when, a few days afterwards, the plaintiff went to the defendant and insisted upon the mule being delivered back, and it was agreed between the parties that they should meet on a day fixed and settle the question, the plaintiff could not, without a demand, bring an action of trover for the mule before such day.
2. Whether he could have done so after a demand, *Quaere*.

TROVER, for a mule, tried before *Barnes, J.*, at Spring Term, 1867, of the Superior Court of Franklin.

The description and the circumstances attending the mule were such that each party had reasonable cause to believe it to be his. Upon an interview between them a short time before this suit was brought, the plaintiff, who had possession of the mule, was induced, by an affidavit made by one Edwards and the defendant, to deliver it up to the latter as his own, and he thereupon put it to work. Some ten days thereafter, having in the interval discovered strong reasons for believing it to be his, the plaintiff went to the defendant and demanded it, and then proposed that he and the defendant should meet at a certain time and place, and settle the question. This was agreed to by the defendant; but before the time arrived, without further notice, this action was brought.

By consent, the jury was allowed to pass upon the question of title and the amount of damages, subject to the opinion of the court (reserved) upon the question whether a demand and refusal were necessary.

Verdict for the plaintiff. Verdict set aside and nonsuit. Whereupon the plaintiff appealed.

Moore, and *Rogers & Batchelor*, for the appellant.

(336) If there were a conversion at any time during the whole transaction, the nonsuit was wrong. The wrongful assumption of title was such a conversion. Brown on Actions, 337; *Hare* v. *Pearson*, 26 N. C., 76; *Ragsdale* v. *Williams*, 30 N. C., 498. Belief in his claim will not excuse. *Carraway* v. *Burbank*, 12 N. C., 306; *Dowd* v. *Wadsworth*, 13 N. C., 130. The defendant's claim was for himself and not for another, which renders the conversion complete, notwithstanding the mistake. *Lee* v *McKay*, 25 N. C., 29.

Young, *contra.*

1. Notwithstanding the verdict upon the question of title, trover could not be supported upon what occurred

before the second interview, without a demand and refusal. Neither the honest claim of the defendant, sanctioned by oaths and admitted by the plaintiff, nor the lawful possession which resulted therefrom, nor the use, consistent with the scope of such possession, was such conversion. *Glover* v. *Riddick*, 33 N. C., 582; Chit. Pl., Trover, Esp. N. P., 589, Buller N. P., 44.

2. Nothing occurred at the second interview to dispense with a demand. Indeed, after the agreement then made, it was a breach of faith to bring this suit without a demand. Even a demand would not have justified a suit before the day on which they were to meet. *Ragsdale* v. *Williams*, 30 N. C., 498.

PEARSON, C. J. Trover "is an action *ex delicto*," and the gist of the action is a wrongful conversion. We concur with his Honor, that the facts do not make out a cause of action. The defendant had probable cause of action, and did believe that the mule was his property. The plaintiff, being also satisfied of that fact, put the mule in possession of the defendant. Up to that time there was nothing wrong, no tort. There was nothing in the defendant's putting the animal to work, for it could hardly be expected that he was to keep (337) him in his stable doing nothing. And when the plaintiff changed his opinion, and gave notice of it to the defendant, the latter did nothing wrong; on the contrary, he averred a willingness to do what was right, and there is no ground on which to question his sincerity; and, thereupon, it was agreed that the defendant should retain the possession until the Saturday following, on which day the parties were to meet, and endeavor to arrange the matter of controversy. After this agreement, it was well put by Mr. Young, on the argument that the plaintiff was not at liberty to terminate the bailment, before the day fixed on, by a demand; but without deciding that point, we are entirely clear in the opinion that the plaintiff could not, without a demand, commence an action treating the defendant as a wrongdoer, and thereby subject him to the costs of a lawsuit, before the day which had been agreed on, and up to which day the plaintiff had consented that the defendant should retain the possession. If the defendant had sold the mule, or attempted in breach of the bailment, to run it out of the State, the case would have assumed a different aspect, and put the defendant in the wrong. But there was nothing of this kind to terminate the bailment, and the plaintiff was wrong for bringing the action in violation of his agreement. The case seems to be so plain as not to call for an examnation of the authorities. Indeed, there is no question about the principle on which the action is based, and the only difference which ever occurs is as to the application of the principle; but, in this case, the application as well as the principle, is free of difficulty.

There is no error.

PER CURIAM. Judgment affirmed.

(338)

STATE v. JAMES POTTER.

1. There is no ground for arrest of judgment unless a fatal defect appears in the record proper, as distinguished from the statement of the case by the Judge.
2. The Statute of Ann, allowing a defendant to enter two or more pleas, does not apply to indictments.

INDICTMENT, for assault and battery, tried before *Mitchell, J.*, at Spring Term, 1867, of the Superior Court of Lenoir.

The defendant pleaded *autrefois convict* and not guilty.

The case, as made up by his Honor, states that there was evidence that in the Spring of 1865 the defendant and another went to the house of Sarah Hill, the prosecutrix, in the night time, and after threats and firing of guns, obtained admittance; that the defendant laid his hands on the prosecutrix and attempted to pull her out of the door; that he then went into the yard, where he stayed a short time, and then returned and burst open the door, and several times pointed a gun at the prosecutrix.

The above facts had been given in evidence on a similar indictment in the County Court of Lenoir, and the defendant introduced the following record from March Term, 1867, of that court: "State v. James Potter and Isaac Moyer. A and B. The defendant James Potter comes into open court and submits. Judgment suspended upon payment of costs and in custody of sheriff till costs are paid."

The statement of his Honor proceeds: "A verdict of guilty was rendered. subject to the opinion of the court."

"The Solicitor insists that the evidence in this case establishes two assaults and batteries; that, as no judgment was pronounced in the County Court, the record of that court in this trial is no protection against even a single assault. On motion of the defendant judgment is arrested, from which the Solicitor prays an appeal, which is granted."

(339) *Attorney-General*, for the State.
No counsel for the defendant.

PEARSON, C. J. The record and case sent up by the Judge is in such shape that this court can take no action on it, except to award a *venire de novo*.

We can see no ground for an arrest of judgment. That must be for some fatal defect apparent on the face of the record proper, as distinguished from what is set out in the *Postea*, or case made up by the Judge.

"A verdict of guilty was rendered, subject to the opinion of the court." This, we suppose, was intended to present the question on the plea of "former conviction," and yet the Judge has given no opinion upon either of those questions; so we have nothing to act on, and the case must be sent back for another trial.

It seems the defendant pleaded "not guilty," and also pleaded "former conviction," which latter is a plea confessing and avoiding, and is manifestly inconsistent with the former plea. As the Statute of Ann, allowing more than one plea, does not apply to indictments, the defendant must put himself upon only one of the pleas, or the court should treat the latter plea a waiver of the former, as was the case at common law in respect to a plea "since the last continuance" in civil suits.

PER CURIAM. *Venire de novo.*

Cited: State v. *Craige*, 89 N. C., 479; *State* v. *Harrison*, 104 N. C., 731; *State* v. *Ashford*, 120 N. C., 589; *State* v. *Furr*, 121 N. C., 609.

(340)

STATE v. DANIEL SMITH.

A stick with which the mortal blow was given may well be described in an indictment for murder as "a certain stick of no value."

(*State v. Owen*, 5 N. C., 452, cited and approved.)

MURDER, tried before *Buxton, J.*, at the Spring Term, 1867, of the Superior Court of Burke.

No statement of the facts of the case is necessary.

Under the charge of the court the jury found a verdict of guilty, and the defendant appealed.

Moore, for the appellant.

Attorney-General, for the State.

The form of the indictment is sustained by Wharton's Prec, pages 51 and 71; 3 Chit. C. L., 761; Arch. Cr Pl., 314 and 395. See also *Owen's case*, 5 N. C., 452; 1 Russ. Cr., 466; Roscoe, 706; 1 East. P. C., 341; 2 Hale P. C., 185.

BATTLE, J. This case comes before us upon a motion for a new trial, and also upon a motion to arrest the judgment.

The motion for a new trial has been very properly abandoned by the counsel in this court, for there is not the slightest pretext for it. The bill of exceptions shows that the trial was fair, and the prisoner properly convicted.

Upon the motion in arrest the only error assigned is that the indictment describes the instrument with which the mortal blow was inflicted simply as "a certain wooden stick of no value," without stating its length and thickness, so as to show that it was a deadly weapon It was necessary to set forth the manner of the death, and that, it is contended, was sufficiently done by the statement that it was with a "wooden stick." In support of this proposition approved precedents are relied upon. Thus "an iron poker" and (341) a "certain stone" are given as examples of the description of the instruments by which death was caused. See Wharton's Precedents, at pages 51 and 71. In *State* v. *Owen*, 5 N. C., 452, an indictment describing the instrument of death as "a stick of no value" was not noticed as an objection either by the counsel or the court. The case is of greater authority, because the counsel for the prisoner, who was a very able criminal lawyer, rested his motion for an arrest of the judgment upon a point of great doubt, and one which has been since settled against him by statute. Both the counsel and the court would have been relieved from their difficulty had the description of the stick been deemed insufficient.

The motion in arrest, as well as that for a new trial, must be overruled, and, as we discover no error in the record, it must be so certified as the law directs.

PER CURIAM. There is no error.

(342)

THOMAS JOHNSTON v. WILLIAM H. CRAWFORD and JAMES CRAWFORD.

1. In an action of trespass, for a violent assault and battery, evidence that two weeks before, one of the defendants, who were brothers, had been beaten by the plaintiff, is not competent; nor is it competent to show that several hours before, on the same day, the plaintiff had threatened to beat one of the defendants, and that such threat had been communicated to the defendant.
2. In estimating damages in such actions, the jury can take no notice of a sum of money paid into court for the use of the plaintiff at a former term upon leave granted, the plaintiff having refused to receive it.
3. A record of a conviction, and of the fine and costs incurred under an indictment for an assault and battery, is admissible in mitigation of punitory damages in a civil action for the offense.

(*Barry v. Ingles*, 3 N. C., 102, S. C., 1 N. C.; *Goodbread v. Ledbetter*, 18 N. C., 12, and *Governor v. Sutton*, 20 N. C., 484, cited and approved.)

TRESPASS, for an assault and battery, tried before *Gilliam, J.*, at Spring Term, 1867, of the Superior Court of Rowan.

Upon an afternoon in June, 1862, the plaintiff, while passing over a bridge, in the town of Salisbury, upon which the defendants, who are brothers, were standing, was assaulted by them with stones and a club, and badly bruised and injured about the head and shoulders. He did not speak to or look towards the defendants as he passed, and the stones were thrown after he had advanced a few steps beyond them. He was struck upon the head by two stones, and while staggering from the effects, the defendant William advanced and gave him several blows with a club, by which he was felled to the earth, senseless. The plaintiff was not aware of the intended assault upon him until he was struck with one of the stones. He was for several weeks under medical treatment for his injuries.

The defendants offered to prove, in mitigation of damages, that about two weeks before the plaintiff was thus assaulted and beaten, he had committed an assault (343) and battery on the defendant William; and also that, on the forenoon of the same day, the plaintiff told one Bradshaw that he intended to thrash the defendant William before he, the defendant, went to Virginia with his company, and that this threat was communicated to the defendant William. This evidence was ruled out, and defendants excepted.

The defendants then offered in evidence, for the mitigation of damages, a record of the Superior Court of Rowan, at Spring Term, 1864, showing a conviction of the defendants on an indictment for this assault and battery, and of the fine and costs imposed and paid, and also an entry on the docket made at the same term, showing permission granted to the defendants to pay into court, for the use of the plaintiff, $1,000 in Confederate Treasury notes, and the costs of the suit up to that time. This the plaintiff had declined to receive.

The Court charged the jury, that, in estimating exemplary damages (if they saw proper to give any) they ought to take into consideration the fines and costs paid by the defendants in the indictment; but that the Confederate money paid into court, which the plaintiff always declines to receive, they were not to consider, in estimating damages, whether actual or exemplary.

Verdict for plaintiff. Rule for new trial. Rule discharged, and appeal by defendants.

J. H. Wilson, for the appellant.
Boyden & Bailey, *contra*.

1. Evidence of what passed two weeks before was incompetent. 2 Greenl. Ev., sec. 268, Sedg. Dam., 555; *State* v. *Gibson*, 32 N. C., 214.

2. Evidence of the threat in the forenoon incompetent. 2 Greenl. Ev., sec. 93.

3. The fine and costs in the indictment are to (344) be considered only as regards the punitory portion of the damages. *Smithwick* v. *Ward*, 52 N. C., 64.

4. The payment of Confederate money into court was *coram non judice*. The order allowing it is of the first

impression. Tender of amends is not allowable in such an action. Compare Rev. Code, chap. 31, sec. 79, with Stat. of Jas. I, on which it is modelled. 3 Chit. Genl. Pr.. 684.

See also Bacon Ab., title, "Tender, and bringing money into court, 8, in an action of trespass."

BATTLE, J. The testimony offered by the defendants to prove in mitigation of damages that about two weeks previous to the battery complained of, the plaintiff had assaulted and beaten the defendant William H. Crawford, was properly rejected. It is well settled that though a provocation, which is calculated to excite the passions, may be given in evidence for such a purpose, yet it must be a provocation so recent and immediate as to induce the presumption that the violence done was committed under the influence of the feelings and passions excited by it. *Lee* v. *Woolsey*, 19 John , 319; Sedgwick on Damages, 555; or, as was said in the case of *Barry* v. *Ingles*, 3 N. C., 102, S. C., 1 N. C., 121, "Such things ought not to be conssidered as alleviating the offense of falling upon the plaintiff at a subsequent late period, after there was time for the passions to cool and the defendant's action to be guided by reflection." The true principle thus appears to be that an excessive assault and battery may be mitigated when it proceeds from the passion of anger justly excited by an immediate provocation, but not when it is prompted by malice or revenge. The same principle has been applied in an action of slander, to prevent the defendant from proving in mitigation of damages that, previous to the speaking of the words, the plaintiff was in the habit of villifying and abusing the defendant. *Goodbread* v. *Ledbetter*, 18 N. C., 12. And we think it applies (345) also to the testimony which was offered by the defendants in the present case to prove that on the forenoon of the day on which the battery was committed the plaintiff said that he intended "to thrash" the defendant William. That threat, though communicated to the defendant during the forenoon of the same day, could not have moved a man to commit so deliberate and cruel an assault and battery, unless actuated by a feeling of deadly revenge. Had the passion of anger only been excited, the interval of five or six hours between the threat and the violence, afforded ample time for the passions to subside and reason to resume her sway.

The defendants had the benefit of the Judge's charge in favor of allowing them, in mitigation of the claim for punitory damages, the amount of the fine and costs which they had paid upon the indictment; but there was not the slightest foundation for allowing the sum which they paid into court in the civil suit The rule in relation to the payment of money into court does not apply to an action of tort, unless given by statute. See the authorities referred to by the plaintiff's counsel, 3 Chit Gen. Prac., 68, and 9 Bacon Ab., "Tender and bringing money into court, 8, in action of trespass," page 558. In this State it was said, in *Governor* v. *Sutton*, 20 N. C., 484, that the general rule is, that money may be paid into court when the action is brought for a sum certain, or capable of being ascertained by computation, but not in an action for general damages. For this is cited *Kallett* v. *East India Company*, 2 Burr., 1120; *Salt* v. *Salt*, 8 T. R., 47; *Birks* v. *Trippett*, 1 Wms.' Saund., 33, nn. We have no statute to authorize it in an action of trespass *vi et armis* for an assault and battery; and it was, therefore, properly rejected in the Superior Court.

There is no error in the record, and the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: *Wyatt* v. *Manufacturing Company*, 116 N. C., 283.

(346)

STATE v. CALVIN ALLISON.

It is not necessary for proceedings in bastardy to show affirmatively that the mother of the child was a single woman.

(*State v. Pettaway*, 10 N. C., 623; *State v. Wilson*, 32 N. C., 131; *State v. Herman*, 35 N. C., 502, cited and approved.)

MOTION in proceedings in bastardy, before *Gilliam, J.*, at Spring Term, 1867, of the Superior Court of Iredell.

The proceedings before the Justice of the Peace were returned to the County Court of Iredell, and it not appearing on the face of the proceedings that the mother of the child was a single woman, the defendant's counsel moved to quash. The motion was overruled, and the defendant appealed to the Superior Court. Upon renewal of the motion in the Superior Court his Honor refused to quash, and the defendant appealed to this court.

No counsel for the appellant.
Attorney-General, for the State.

BATTLE, J. It is clearly settled in this State that a man may be charged, under the Act of 1741, Rev. Code, chap. 12, sec. 1, with the maintenance of a bastard child begotten upon a married, as well as upon a single, woman. *State* v. *Pettaway*, 10 N. C., 623; *State* v. *Wilson*, 32 N. C., 131. Hence it must be unnecessary for the proceedings to show affirmatively that the mother of the child was a single woman, it being sufficient for it to appear from such proceedings that the child was adjudged by the justice to be a bastard. If the mother be a married woman, the reputed father may prove the fact before the justice, and insist that the child was born in wedlock, and therefore not a bastard, and the justice must so find unless it be proved to his satisfaction that the child was born under such circum-
(347) stances as to show that he or she could not have been begotten by the husband. So if the woman

state in her examination before the justice that she is a married woman, the question will be raised, and must be decided by him, whether the child was a bastard or not; but if it be not stated by the mother, or proved by the reputed father, that she is a married woman, the adjudication that the child was a bastard will be a matter of course. In the case of the *State* v. *Herman*, 35 N. C., 502, the warrant did not show whether the woman was married or single; but in her examination before the justice she stated that she was then a married woman. The proceedings were afterwards quashed by the County Court, because it appeared that, though she swore that she had been delivered of a bastard child, of which the defendant, was the father, and that when the child was begotten she was a single woman but had afterwards married, she did not state whether the child was born before or after her marriage. This order to quash was reversed by the Superior Court, but affirmed by this court, and in giving the reason for so doing not a word of objection is urged against the sufficiency of the warrant because of its omission to state whether the woman was married or single.

There is no presumption of law that a woman is married rather than single, and when the proceedings in bastardy before a justice show that a child has been adjudged to be a bastard, the reputed father can not be in any way prejudiced by its being assumed that the mother is a single woman, until it is made to appear by her statements or his proof that she is married.

There is no error in the judgment of the Superior Court, and it must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: State v. *Higgins*, 72 N. C., 227; *State* v. *Peeples*, 108 N. C., 769; *State* v. *McDowell*, 101 N. C., 736.

(348)

DANIEL HEDRICK v. GODFREY GOBBLE.

The rule that, in controversies between titles of different dates which lap, actual possession of the lappage is required to perfect the color of title of the junior claimant, applies to controversies between the State and citizens who claim under *mesne* conveyances which extend the boundaries of the original grant.

(*Smith v. Ingram*, 29 N. C., 175, cited and approved.)

TRESPASS Q. C. F., tried at Spring Term, 1867, of the Superior Court of Randolph, before *Warren, J.*

The plaintiff claimed under a grant from the State made in 1858.

The defendant claimed under a deed from his father made in 1830, and the latter under a deed from one Millsaps, made in 1805; and Millsaps had received a grant from the State in 1783 Whether the *locus in quo* was covered by the grant of 1783 was not clear, but it was covered by the deeds of 1805 and 1830 (which extended the boundaries of that grant), and also by the grant of 1858. The defendant had long been in actual possession of the land clearly covered by the grant of 1783, but of the lappage he had had possession only for a short time before this suit was brought.

In one aspect of the case his Honor instructed the jury, that if they found that the mesne conveyances covered the land in controversy with known and visible boundaries (though the grant of 1783 might not), and that from 1805 until 1858 (the date of the last grant) the defendant and his father had had continued actual possession of a part of the land, claiming the whole up to said boundaries, although such part was common to both the mesne conveyances and the Millsaps grant, the plaintiff was not entitled to recover.

Verdict for the defendant. Rule for a new trial. Rule discharged. Judgment, and appeal by the plaintiff.

(349) *T. J. Wilson,* for the appellant.
Gorrell, contra.

The defendant never had such a possession of the *locus in quo* as exposed him to an action by the State, and therefore the lapse of time has not divested its title. *Williams* v. *Buchanan*, 23 N. C., 535; *Fitzrandolph* v. *Norman*, 4 N. C., 564; *Graham* v. *Houston*, 15 N. C., 232; *Pace* v. *Shelton*, 26 N. C., 32.

BATTLE, J. The defendant seeks to justify the trespass alleged in the declaration, upon the ground that he had acquired title to the *locus in quo* under the Act of 1791, Rev. Code, chap. 65, sec. 2. That act makes a possession of twenty-one years under a color of title, under known and visible lines or boundaries, a bar to the State. All the cases show that the possession spoken of must be constituted by such acts as would expose the party to a suit by the State, or by some person claiming under the State; for it is the forbearance to sue that raises such a presumption of right as induced the Legislature to ratify the apparent title. The same rule holds with regard to the possession for seven years under color of title, which bars the claims of an individual. Revised Code, chap. 65, sec. 1. It is for this reason that if two grants or deeds lap, the adverse possession for seven years of the junior grantee or bargainee, who has not taken actual possession of the lapped part of the land, can not give him any right to that part against the elder grantee or bargainee. See *Smith* v. *Ingram*, 29 N. C., 175, and other cases in Battle's Digest, under the title of ejectment—of the title necessary to support the action. Analogous to this is the case of the State before it has made any grant, and a person who has taken a deed for a parcel of vacant land from another person, but has not entered into possession. The opposing claims of the State and the bargainee may be said to lap, but the possession (350) will be that of the State, until the bargainee makes an actual entry and takes possession of the land; until he does that, the State can not sue him, and, therefore, no length of time, though there may be visible lines or boundaries, can give him a title against the State.

In the present case, the defendant held a rightful possession under the title derived from the grant to Millsaps, but he never took possession of any part of the land outside of the bounds of that grant and within those of the deed from Millsaps to his father, and, therefore, the possession of the State to such part was never divested before it made the grant to the plaintiff.

Upon the facts proved, the plaintiff was, in our opinion, entitled to recover, and his Honor erred in not so instructing the jury.

PER CURIAM. Judgment reversed, and *venire de novo.*

TURNER HOGWOOD v. JOSEPH EDWARDS and WILLIAM EDWARDS.

Where a ditch formed the boundary between the lands of the plaintiff and those of A. B., and an obstruction had been placed therein by the plaintiff, with the consent of A. B., in order to prevent sand from being carried down and choking a ditch of his own: *Held,* that trespass was not the proper form of action to redress an injury (the choking of the plaintiff's ditch) caused by the defendant's removing so much of such obstruction as was upon A. B.'s half of the boundary ditch—the latter having consented to such removal.

(*Kelly v. Lett,* 35 N. C., 50, cited, distinguished, and approved.)

TRESPASS, tried at Spring Term, 1867, of the Superior Court of Franklin, before *Barnes, J.*

The evidence showed that there was a boundary (351) ditch between the lands of the plaintiff and those of Mrs. Rebecca Patterson, and that, with the consent of the latter, he had placed in it an obstruction (viz , a log thrown across, and rails with one end resting upon the bottom of the ditch and the other against the log), in order to prevent sand from being carried down and choking a ditch of his own which ran into the boundary ditch; that the defendant, who owned land upon both sides of the ditch above the obstruction by the permission of Mrs. Patterson, removed so many of the rails as were upon her half of the ditch, whereupon the sand passed down and filled the plaintiff's ditch, and caused his land to overflow.

The court instructed the jury that if the defendants removed the obstruction without the consent of the plaintiff, and against his wishes, the latter would be entitled to recover actual damages sustained therefrom; and if there were no actual damages, he would be entitled to nominal damages.

Verdict for six pence. Rule for new trial. Rule discharged. Judgment, and appeal by the defendants.

Davis, for the appellants.
No counsel, *contra*.

BATTLE, J. We are unable to perceive any ground upon which the action of trespass *vi et armis* can be sustained upon the facts of the case. The defendants did not go upon the land of the plaintiff, nor, in any way, wilfully send down water and sand upon it. It is therefore unlike the case of *Kelly* v. *Lett*, 35 N. C., 50, where the defendant, who owned a mill on the same stream and above one belonging to the plaintiff, wilfully, and with intent to injure the plaintiff, frequently shut down his gates, so as to accumulate a large head of water, and then raised them, whereby an immense volume of water ran with great force against the (352) plaintiff's dam, and washed it away. In that case, it was properly held that an action of trespass *vi et armis* was the proper remedy; but in the present case, the facts are that the defendants neither acted wilfully nor with intent to injure the plaintiff; and, if any damage were sustained by him, it was altogether consequential to the acts of the defendants, and, therefore, the action of trespass on the case would have been the proper remedy.

Under the Act of 1858, chap. 37, the plaintiff might have joined the action of trespass on the case with that of trespass *vi et armis*, but he has not thought proper to do so; and, if he had, it would not have availed him in this particular case, because the jury did not find that he had sustained any actual damages. The nominal damages were given upon the mistaken supposition of the Judge that there was a trespass with force and arms.

There was error, and the judgment must be reversed.

PER CURIAM. *Venire de novo.*

(353)

WILLIAM R. HICKS v. ANSON CRITCHER.

1. A creditor having desisted from suing his debtor upon request by a third person to that effect, the latter adding: "He has put property in my hands to pay his debts, and when I sell it I will pay you all he owes you:" *Held*, that an action of *assumpsit* could not be maintained against such person, without showing that he had received money from the property in his hands.
2. Both parties having been introduced as witnesses for the plaintiff, the plaintiff testified to the language above as having been uttered by the defendant, whilst the latter (upon cross-examination) said "that he did not remember that he ever had any such conversation; that the debtor had never placed any property in his hands, and that he had no property of his in his hands." Upon this the court instructed the jury, that it was their duty to reconcile contradictions if they reasonably could; that as the testimony of the plaintiff was positive, and that of the defendant "that he did not remember," if they found there was no such agreement, it would be an imputation upon the veracity of the plaintiff, whereas if they found that there was, there would be no such imputation upon the veracity of the defendant, and in this way their statements might be reconciled, but that it was a matter for them: *Held*, that the court erred therein in intimating an opinion as to a matter of fact.

(*Draughan v. Bunting*, 31 N. C., 10; *Stanly v. Hendricks*, 35 N. C., 85, and *Page v. Einstein*, 52 N. C., 147, cited and approved.)

ASSUMPSIT, begun by warrant and tried at Spring Term, 1867, of the Superior Court of Granville, before *Warren, J.*

The plaintiff testified that one Barnett, a son-in-law of the defendant, owed him $24, due by bond given in 1859; that in the same year, Barnett being about to leave the State and the plaintiff about to sue out a warrant on his debt, the defendant said to him, "Doctor, don't warrant Barnett; he has put property in my hands to pay his debts, and when I sell it I will pay you all he owes you"; whereupon the plaintiff desisted, and the debt remains unpaid.

The defendant (who was called by the plaintiff) stated that all Barnett's property was sold before the commencement of this suit; also (upon cross-examination) that he did not remember that he ever had any (354) such conversation with the plaintiff as that sworn by him; that Barnett had never placed any property in his hands, and that he had no property of his in hand; that after the time spoken of by the plaintiff (to wit, in November, 1859), Barnett made a deed of trust conveying all his property to one Howard, for payment of his debts; that the proceeds of this property proved insufficient to pay off the debts in the first class, the plaintiff's being in the second class.

The court instructed the jury (amongst other things) that it was their duty to reconcile contradictions in the testimony, if they reasonably could, so as to avoid the conclusion that either party had committed perjury; that, as the testimony of Dr. Hicks was positive, and that of the defendant, "that he did not remember"; if they found that no such agreement was made, it would be an imputation upon the veracity of the plaintiff, whereas, if they found that it was made, there would be no such imputation upon the veracity of the defendant, and in this way their statements might be reconciled; but it was a matter for them. Also, that if they found that the contract was made, their next inquiry would be whether the defendant had, at or before the commencement of this suit, funds in his hands belonging to Barnett applicable to this debt; if he had, the statute of frauds did not apply, and the plaintiff would be entitled to their verdict; but if they did not find affirmatively on both of these questions, their verdict should be for the defendant.

Verdict for the plaintiff. Rule for a new trial. Rule discharged. Judgment, and appeal.

Cantwell, for the appellant.
Edwards, *contra*.

PEARSON, C. J. We do not concur with his Honor in the view taken of the case.

(355) He left it to the jury to say "whether the defendant had funds in his hands belonging to Barnett." By this we are to understand property as distinguished from money; for there was no evidence that he had money in hand. On the contrary, the defendant, being made a witness by the plaintiff, swears that all of Barnett's property was sold by one Howard, to whom Barnett had made a deed of trust.

To entitle the plaintiff to recover it was necessary to show that the defendant had money of Barnett's in his hands. The promise is to pay "when I sell the property."

Draughan v. *Bunting*, 31 N. C., 10, turns on the fact that Bunting had the cash in hand; and so in *Stanly* v. *Hendricks*, 35 N. C., 85, it is assumed that the defendant had made sale and realized the price.

It is familiar learning that, to maintain the action for money "had and received," or for money "paid," the defendant must have the money; indeed the very name given to these actions show that it must be so. See *Page* v *Einstein*, 52 N. C., 147. The suggestion that the defendant either had sold the property, or was guilty of gross *laches* in not selling in so long a time, can not avail the plaintiff in this action, which was commenced before a single justice of the peace. Whether it would support an action of another kind is not now presented.

We also think his Honor erred in intimating an opinion as to a matter of fact in regard to reconciling the testimony.

PER CURIAM. *Venire de novo.*

Cited: Mason v. *Wilson*, 84 N. C., 54.

(356)

PATIENCE COLLIER, Adm'x. of ISAAC D. COLLIER, v. THE Executors of NICHOLAS W. ARRINGTON.

1. An action of trespass, brought to recover damages for a death caused by a wrongful act (Rev. Code, c. 1, s. 9), does not abate by the death of the defendant.
2. The damages in such an action are confined to the measure of the pecuniary injury caused by the killing, and are not intended as a *solatium* to the plaintiff, or as punishment to the defendant.

(*Buttner v. Keehln*, 51 N. C., 60, cited and approved.)

SCIRE FACIAS, to revive an action of trespass, heard before *Barnes, J.*, at Spring Term, 1867, of the Superior Court of Franklin.

The facts were, that in 1861 an action of trespass was brought by the plaintiff against the deceased, Nicholas W. Arrington, to recover damages ($2,000) for the killing of her intestate. The defendant appeared, and entered pleas. Afterwards he died, and a writ of *scire facias*, returnable to Fall Term, 1866, was issued against his executors, in order to revive the suit. To this, for cause of abatement, they pleaded the testator's death since the last continuance. To this plea there was a demurrer, and a joinder in demurrer followed. Thereupon the case was continued.

His Honor gave judgment *pro forma* in favor of the plaintiff, and the defendants appealed.

Edwards, for the appellants.

The Act 9 and 10, Vict. (of which the act upon which the original suit here was brought, Rev Code, chap. 1, sec. 9, etc., is a copy), does not extend the remedy against the executor or administrator of the wrong doer. Broom's Maxims, page 710.

This is a vindictive action *Rippy* v. *Miller*, 33 N. C., 247.

The common law rule as to the abatement of personal actions applies here. See 1 Ch. Pl., pages 68, 69 and 89.

(357) *Moore, contra.*

The statute upon which this action was brought excludes all idea of vindictive damages. The English act, from which it was taken, has frequently been held to authorize only damages for actual loss, excluding *solatium* and *smart money. Blake* v. *Midland Railroad*, 10 Eng. L. and E, 437; S. C., 83 Com. Law, 93; *Dalton* v. *S. E. R. R.*, 93 Com Law, 296; *Pyne* v. *Great Northern Railroad*, 116 Com. Law, 396.

No other similar statute in the Union has the same language as ours. See *Pa. R. R. Co.* v. *McClorky*, 23 Pa., 526; *Mann* v. *Boston and W. R. R.*, 9 Cush., 108; *Hollenbook* v *Berkshire Railway, Ibid.*, 481; *Oldfield* v. *Harlaem Railroad Co.*, 14 N. Y., 310.

Therefore, under the Rev. Code, chap. 1, sec. 1, the decision below is correct.

READE, J. The question involved is. whether the action abates by the death of the trespasser?

An action survives against the representatives of the deceased party, except it be for "damages merely vindictive." Rev. Code, chap 1. sec. 1.

It is insisted for the defendant that the proper construction of the statute is, that an action for trespass against the person does not abate by reason of the death of the plaintiff, but does abate by reason of the death of the defendant. The statute is as follows: No action, etc, whether at law or in equity, except suits for penalties and for damages merely vindictive, shall abate by reason of the death of either party, etc., but the same may be carried on by the heirs, executors and administrators of the deceased party, etc.

It is insisted that, although the act is express that it shall not abate by the death of either party, yet it only provides for its being carried on by and not against the representatives; and that a suit is carried on by a plaintiff and against a defendant; and that therefore (358) there is no provision for carrying it on against the representatives of a deceased defendant. We find, by reference to the Rev. Stat., chap 1, that it was provided that it should be carried on by or against the representatives of either party; and it seems that in transcribing the words "or against" were left out of the Revised Code. But we feel obliged to construe the statute as if the words "or against" were in it. The language is express, that it shall not abate by the death of either party. If it shall not abate, then it must be carried on. It can not be carried on by one party without being carried on against the other party. It can not be carried on against the person who committed the trespass, for he is dead; and, therefore, if carried on at all, it must be against his representative. The reason why, at common law, an action against a trespasser died with the person, was that it was not so much an action for pecuniary loss as it was for a *solatium* for the wounded feelings of the plaintiff, and for the punishment of the defendant. But the plaintiff could not be solaced, nor the defendant punished after death. But our statute, which gives an action to the representative of a deceased party, who was injured or slain by a trespasser, confines the recovery to the amount of pecuniary injury. It does not contemplate *solatium* for the plaintiff, nor punishment for the defendant. It is therefore in the nature of pecuniary demand, the only question being, how much has the plaintiff lost by the death of the person injured? And it is to be considered without regard to the malice or vindictiveness of the trespasser; and the court below on the trial will confine the investigation to the "pecuniary injury" to the beneficial plaintiffs.

We conclude that the present action is not for "damages merely vindictive," and does not abate by the death of the defendant. *Butner* v. *Keehln*, 51 N. C., 60.

PER CURIAM. There is no error.

Cited: Shields v. *Lawrence*, 72 N. C., 45; *Peebles* v. *Railroad*, 63 N. C., 240; *Kesler* v. *Smith*, 66 N. C., 157; *Bradley* v. *Railroad*, 122 N. C., 974.

(359)

JOHN W. PUGH v. THE RALEIGH AND GASTON RAILROAD COMPANY.

The Raleigh and Gaston Railroad Company did not incur the penalties imposed by the Rev. Code, c. 101, s. 30, by transporting its passengers and freights in boats, across the Roanoke, at Gaston, during the time that there was no bridge at that point, in consequence of its having been burned by the military, in 1865.

DEBT, tried at Spring Term, 1867, of the Superior Court of Northampton, before *Barnes, J.*

The facts necessary to an understanding of the opinion will be found therein.

In the Court below the jury found a verdict for the plaintiff, subject to the opinion of the Judge, upon matter reserved. Upon consideration, his Honor set the verdict aside, and the plaintiff appealed.

Bragg, for the appellant.
Moore, and *Rogers & Batchelor*, *contra.*

PEARSON, C. J. This is debt for $12,006, claimed as penalties for transporting persons and property across the Roanoke River at Gaston, contrary to the statute. Revised Code, chap. 101, sec. 30.

NOTE.—Judge Battle, being one of the stockholders in the Raleigh and Gaston Railroad Company, took no part in the decision of this case.

The statute provides: "If any unauthorized person shall pretend to keep a ferry, or to transport for pay any person and his effects, within ten miles of any ferry on the same river or water, which theretofore may have been appointed, he shall forfeit and pay two dollars for every such offence to the nearest ferryman."

The old Raleigh and Gaston Railroad Company was incorporated in 1835, and was authorized to con- (360) struct a railroad from some point in or near the city of Raleigh to some point at or near Gaston, on the north side of the Roanoke River, heretofore called Wilkins' Ferry, and "to provide everything necessary and convenient for the purpose of transportation on the same." Out of abundant caution the railroad company paid to Wilkins the sum of $3,000, in satisfaction of the damages he claimed by reason of his ferry. The plaintiff is the lessee of Wilkins, and stands in his place in reference to the ferry.

The old company failed and was bought out by the State, and, in 1852, the present Raleigh and Gaston Railroad Company was incorporated, and the State transferred to it the road, property and rights of the old company. In 1865 the railroad bridge at Gaston was burned down by order of the military authority, and the railroad company then used boats to transport their passengers and freight across the river at the nearest convenient points below the site of the bridge.

I have stated the facts, because, as it seems to the court, a mere statement is sufficient to show that the plaintiff can not maintain his action. There is no error.

The question is, are the defendants "unauthorized persons?" Clearly not, for the charter gives the company full authority to transport its passengers and freight across the river at or near Gaston, and the legal effect of the acts of incorporation is to repeal the act under which the plaintiff claims the penalties in respect to the ferry at Gaston, and to make a special exemption in favor of the railroad company, as much so as if a proviso to that effect had been inserted in the general statute. The power of the Legislature to repeal an act imposing penalties, or to make exceptions to its operation, was not questioned in the argument, and is in fact too clear for discussion.

After the bridge was destroyed the railroad company was required and authorized by the acts of incorporation to adopt all necessary and convenient means (361) to transport its passengers and freight across the river, and this authority had reference to a convenient place near the site of the bridge, as well as the kind of boats to be used. So the company was not put in the dilemma either to leave its passengers and freight on the river bank or else to submit to such terms as the plaintiff, who was the lessee of Wilkins' Ferry, might see proper to impose. What injury was done to the plaintiff by the fact that the company had to resort to boats until the bridge could be rebuilt? None whatever, for the use of its boats was confined exclusively to the transportation of passengers and freight; so the plaintiff stands in the attitude of one seeking to enforce penalties because he was not permitted to take benefit from the misfortune of others.

We deem it unnecessary to notice the many points that were discussed in the learned arguments with which the court was favored.

PER CURIAM. Judgment affirmed.

(362)

NICHOLAS WHITFIELD v. JOSEPH BODENHAMMER.

1. Two neighbors having agreed to build a rail fence upon the boundaries between them, it was also agreed that the eastern half of it should be built by the plaintiff and the western by the defendant. In building his part the defendant, inadvertently or to get a better location, placed it altogether upon the plaintiff's land: *Held*, that he was not liable to the plaintiff in an action of trespass *quare clausum fregit*, for subsequently removing his part of such fence.
2. *Held also*, that neither the agreement between the parties about the building of the fence, nor a subsequent notice given by the defendant to the plaintiff of his intention to remove it, were (under the circumstances) evidence of license by the plaintiff of a removal.

TRESPASS Q. C. F., tried before *Warren*, *J.*, at Spring Term, 1867, of the Superior Court of Forsyth.

The evidence showed that the parties owned adjoining lands and agreed to build a rail fence upon a boundary line between them running east and west, the eastern half to be built and maintained by the plaintiff, and the western half by the defendant; also that the defendant, inadvertently, or in order to secure a better location for his part, placed it entirely upon the plaintiff's land. Subsequently the defendant gave the plaintiff notice in writing that he intended, on a certain day, to have his land surveyed, and to set his fence upon his own land, and that he might attend and see it done. On that day the defendant attended but no surveyor came, whereupon another day was appointed. Before that day the defendant removed his part of the fence. On the second appointed day the parties met and surveyed the whole east and west line on which the fence had been placed.

In the court below his Honor instructed the jury that there was no evidence of license by the plaintiff, and that if the plaintiff had proved that the defendant had trespassed upon his land, he was entitled to their verdict.

(363) Verdict for the plaintiff. Rule for a new trial. Rule discharged. Judgment, and appeal by the defendant.

T. J. Wilson, for the appellant.

1. There was evidence of license *Harrison* v. *Parker*, 6 E., 164; 2 Saund. Rep., 113, note c; 3 Ire., 374.
2. Defendant had possession of fence, or was tenant in common, and in either case not liable in trespass. *McPherson* v. *Sequine*, 14 N. C., 153.

No counsel in this court, *contra.*

PEARSON, C. J. An unfortunate misunderstanding between two neighbors has originated a "new point" for the decision of the courts, and resort must be had to the analogies of the law.

The attention of his Honor seems to have been confined to the question, whether there was any evidence that the plaintiff had given license to the defendant to remove the fence. We concur with him in the opinion that there was no evidence to support this allegation; for it must be taken as a matter of course that the plaintiff objected to the removal of the fence.

But in deciding a case the court is bound to look at the whole record, and the whole case made by the record and the evidence; and it is manifest that the plea, "not guilty" of the trespass complained of, presents the broad question; "Upon the facts stated, can the plaintiff maintain an action of trespass *vi et armis, quare clausum fregit?*"

We are of opinion that the evidence set out by his Honor did not make a case upon which the plaintiff could maintain the action, and that his remedy, if he had any cause of complaint after the defendant had given notice for the purpose of putting an end to the agreement in regard to the dividing fence, was by action on the case in *assumpsit.*

(364) By the agreement the fence, a worm fence, was to be built on the dividing east and west line. The rails were to be laid so that one-half of the ground-rail should be on plaintiff's land, and the other half on that of the defendant. Of course in such arrangements

exactness is not expected or required; and it so happened that for some poles near the western corner, the defendant, it being his part to make that portion of the fence, either because he did not know precisely where the line was, or in order to get a better location for the fence, placed the ground rail "altogether over on the plaintiff's land." To this the plaintiff made no objection, and the legal effect was, that the defendant acquired possession up to the turn of the fence; or, at all events, acquired a joint possession with the plaintiff, just as he had in regard to that part of the land where the fence was exactly on the line. Whether he had an exclusive or a joint possession, it is not necessary to determine; for, supposing it to be a joint possession, trespass *vi et armis* does not lie.

If one enters into the house or upon the land of another by his permission, and afterwards does an act inconsistent with the agreement or license under which he entered, he can not be treated as "a trespasser *ab initio.*" That fiction is confined to cases when the entry is allowed by law, as upon an entry into a tavern or store, so that analogy is against the plaintiff. *Six Carpenter's Case*, Coke's Reps. If a tenant at will or from year to year, after notice given, removes a fence or building which he had put on the land, trespass *vi et armis* can not be maintained. The remedy is an action on the case in the nature of a writ of waste; so that analogy also is against the plaintiff.

By laying the fence with his own rails, the defendant acquired either an exclusive or a joint possession of the land on which his rails were put, and of the land enclosed by the fence.

(365) Taking it either way, the plaintiff had not such a possession as enables him to maintain trespass *vi et armis*, unless the plaintiff can treat the defendant as a trespasser *ab initio*, which, as we have said, he can not do.

There is error.

PER CURIAM. Judgment reversed. *Venire de novo.*

WILLIAM C. HARRALSON v. WILLIAM PLEASANTS.

1. An award of arbitrators, to whom a case of trespass *q. c. f.* was referred, that there was "no trespass," enables the court to dispose of the case, and should not be set aside for uncertainty.
2. When an award fails to dispose of the costs, each party must pay his own costs.

(*Gibbs v. Beery*, 35 N. C., 338, cited, distinguished and approved; *Debrule v. Scott*, 53 N. C., 33, cited and approved.)

TRESPASS *quare clausum fregit*, tried before *Mitchell, J.*, upon an award of arbitrators, at a special term, 1867, of the Superior Court of Caswell.

The defendant appealed from a judgment of the court setting aside the award. The facts are stated in the opinion.

Graham, with whom were *Phillips & Battle*, for the appellant.

The award is certain to a common intent, and is equivalent to a verdict of not guilty, the judgment upon which carries costs. *Gibbs* v. *Beery*, 35 N. C., 388; *Carter* v. *Jones*, 20 N. C., 182; *Moore* v. *Gherkin*, 44 N. C., 73; *Miller* v. *Milcher*, 35 N. C., 49. Judgment for costs after such decision was a matter of course. *Arrington* v. *Battle*, 6 N. C., 246, is to be distinguished from this under the rule, "*expressio unius*," etc.

(366) *Morehead, contra.*

The only point in the case is, "did the arbitrators make such an award as would be final between the parties?" *Gibbs* v. *Beery*, 35 N. C., 388, is conclusive against the award.

READE, J. In the brief filed by Mr. Morehead for the plaintiff, it is stated that "the only point in the case is, did the arbitrators make such an award as would be final between the parties, according to the submission?" And we are referred to *Gibbs* v. *Beery*, 35 N. C., 388.

The action is for a trespass on land. The order of reference is "Referred to the arbitrament and award of, etc.; and their award to be a rule of court."

The award sets forth that they had run the lines between the plaintiff and defendant, and that there was "no trespass." But there is no award as to the disposition which is to be made of the suit, or as to the costs.

The case to which we were cited was an action of trespass also, and was referred to arbitrators. The award set forth the single fact that they had run and established the line between the parties, but it did not set forth whether there had or had not been a trespass, which was the very point in the case, and, of course, it determined nothing. The court said it was the duty of the arbitrators to make such a return as would enable the court to enter judgment. But the award directed nothing to be done by the parties, gave no damages to the plaintiff for the trespass, and did not find whether there was or was not a trespass. The award was not, therefore, final, or certain; not even certain to a common intent. But in our case the question is, whether there was or was not a trespass; and the award is, that there was "no trespass"; and that disposes, or enables the court to dispose, of the whole case. If the award had been that there was a trespass, then it would have been necessary to find the damages. But the award that there was no trespass disposes of the case in favor (367) of the defendant. And the judgment must be for the defendant.

The award does not dispose of the costs; and a question arises as to the costs. The general rule is, that the party, in whose favor the judgment is, recovers his costs. But that is not the rule under awards. Unless the award directs how the costs shall be paid, the rule is, that neither party shall recover costs. *Debrule* v. *Scott*, 53 N. C., 73.

PER CURIAM. There is error.

JOHN and ELIZABETH LUTZ, Administrators of Elias Lutz v. DAVID YOUNT.

1. A question having arisen in the course of a trial as to an arrangement in regard to a horse which was the subject of controversy: *held*, that evidence of a similar arrangement at the same time between the parties in regard to a cow was relevant, either as part of the *res gestae*, or as part of the conversation, and thus showing the entire arrangement.
2. A fictitious sale of a horse to prevent it from being impressed by the Confederate Government will not estop the owner from afterwards asserting his title thereto; and in such case, upon the vendee's claiming title to the horse, the vendor may bring suit, without making a formal tender of the note which was one of the forms attending the sale.
3. It having appeared upon the trial that the note was in court, and apparently not claimed by the plaintiffs: *Held*, to have been proper for the court to clear away any doubts by enquiring of the counsel for the plaintiffs at a subsequent stage of the trial, what disposition it was proposed to make of the note.
4. In charging the jury the Judge inadvertently stated an argument. which was then suggested by himself, as having come from the plaintiff's counsel: *Held*, that the defendant had no cause to complain.
5. The rule, that possession is *prima facie* evidence of property, has no application to a case of admitted bailment.

(*Blossom v. Van Amringe*, 62 N. C., 133, cited and approved.)

REPLEVIN for a horse, tried upon the plea property in the defendant, before *Buxton, J.*, at Spring (368) Term, 1867, of the Superior Court of Catawba.

The horse had belonged to the plaintiff's intestate, and in 1862 was placed with the defendant to break and make use of for its feed. It remained there until April, 1864, when it was agreed that in order to keep it from being impressed by the Confederate Government, the defendant should claim it as his own until the danger was over, and, as part of the arrangement, a note for $400 was executed by the defendant. The intestate died in the fall of 1864, and when the administrators demanded the horse, the defendant claimed it as his own, setting up an alleged *bona fide* purchase from the intestate subsequent to the arrangement above.

A principal witness for the plaintiffs was one of themselves (John Lutz), who, although the defendant objected to it, was allowed to prove that at the time of the arrangement in regard to the horse, a similar one was made between the same parties in regard to a cow, which the defendant, in compliance with the understanding, subsequently gave up. In speaking of the note for $400, this witness said that at the time when he demanded the horse of the defendant he had it with him, but "he (defendant) got into a rage, and I don't remember tendering it to him, though I intended to give it up; it is here now." After the case had been closed by both sides, his Honor asked of the counsel for the plaintiffs, "what disposition was proposed to be made of the $400 note?" and they replied that it was at the disposal of the defendant.

It was insisted by the defendant that, as by his own showing, the plaintiffs' intestate had parted with the horse in order to practice a fraud upon the Confederate Government, a court of justice would not relieve him from the consequences of such fraud. He also asked the court to charge the jury that the defendant's possession was *prima facie* evidence of title.

(369) The court refused to give these instructions, saying that the ordinary rule as to the effect of possession as matter of evidence did not apply to a case of admitted bailment. In summing up, the court also inadvertently said: "It is insisted by the plaintiffs, through their counsel, that their readiness to place the horse note at the disposal of the defendant is a circumstance going to show their honesty of purpose and readiness to carry out in good faith the alleged arrangement." This suggestion of honesty, etc., was then made for the first time.

Verdict for the plaintiffs. Rule for a new trial. Rule discharged. Judgment, and appeal by the defendant.

Bragg, for the appellant.

1. The evidence in regard to the cow was improperly admitted. *Bottoms* v. *Kent*, 48 N. C., 156, and cases in 1 Bat. Dig., 453.

2. A tender of the note to defendant when the horse was demanded, or at least at some time before suit brought, was necessary. The offer at the trial was of no avail.

3. The court had no right to suggest to the plaintiffs a surrender of the note, or to intimate an opinion as to the honesty and fairness of the plaintiffs.

Bynum, contra.

1. The charge of fraud upon the Confederate Government is of no avail. *Blossom* v. *VanAmringe*, 62 N.C., 133.

2. There was no trade as to the horse. Pothier Oblig., 4; 2 Bl., 442.

3. Evidence in regard to the cow was admissible, being a part of the *res gestæ*—a part of one entire transaction. 1 Stark. Ev., 39, 47, 48; *Davis* v. *Campbell*, 23 N. C., 482; *State* v. *Emory*, 51 N. C , 133.

PEARSON, C. J. We are of opinion that the defendant has no cause to complain of the ruling of his Honor.

(370) 1. The evidence as to the cow was admissible as a part of the "*res gestæ*," and also as forming a part of the conversation at the time the plaintiff claimed the horse as his father's property; so it could not well have been separated, and was a relevant circumstance to show what was the entire arrangement between the parties.

2. The objection that the arrangement was a fraud upon the Confederate Government is fully met by the case of *Blossom* v. *VanAmringe*, 62 N. C., 133. Indeed it was not insisted upon in this court.

3. At the time the plaintiff claimed the horse as his father's property, the defendant himself put an end to the bailment by disavowing the relation and asserting an absolute property in himself. This gave the plaintiff a good cause of action in replevin, detinue or trover, and it was complete without a formal tender of the

note. The defendant, by his conduct, dispensed with the necessity of a formal tender; for why make it, as the defendant asserted an adversary title?

4. The plaintiff, in giving testimony, said he did not remember tendering the note, "though I intended to give it up, it is here now," evidently meaning "for the purpose of being given up"; and after the evidence was closed, it was entirely proper for his Honor, in order to remove all uncertainty, to inquire what disposition the plaintiff proposed to make of the note; for, as we have seen, after what took place when the horse was demanded, and what occurred at the trial, the cause of action was complete without a formal tender of the note.

5. The defendant has no cause to complain that, in summing up, which he seems to have done very fully on both sides, his Honor suggested a view as coming from the plaintiff's counsel, instead of one which he was at liberty to suggest as coming from himself, which he might have apprehended would give it some (371) undue influence. Indeed, when I was on the Superior Court bench this mode of summing up was very usual, lest the jury might attach more importance to an argument suggested for their consideration by the Judge, than if it was put in the shape of coming from the counsel.

6. His Honor properly declined to give the charge requested as to the effect of possession, for the reason stated by him.

PER CURIAM. There is no error.

STATE v. JOHN PEARMAN and others.

In forcible trespass it is not necessary that the person from whom the property was taken, should have been actually put in fear.

FORCIBLE TRESPASS, tried before *Buxton, J.*, at Fall

Term, 1866, of the Superior Court of Alleghany, upon the following case agreed:

The force charged was in taking a barrel of blue-stone from the possession of one Aaron Phipps. The barrel had been left with Phipps by one Hines and a constable named Rives, Hines claiming that it was the property of himself and the defendants, and Rives claiming that it belonged to a third party. It was not to be given up till called for by Hines and Rives, and was locked in Phipps' smoke-house for safe keeping. After it had remained there a month, the defendants, with two others, went to Phipps' and demanded the blue-stone. He refused to give it up, and they broke open the door, took it, and divided it, leaving a share for Hines.

Phipps and the defendants were friendly; there (372) were no threats used, nor attempts at intimidation, and he was not alarmed by what they did.

A verdict of guilty was entered, subject to the opinion of his Honor upon the question of law reserved.

The court afterwards was of opinion that the facts did not constitute a case of forcible trespass, and set aside the verdict. Appeal by the State.

Attorney-General, for the State.

If a person takes personal property forcibly from the possession of another, with an intent to appropriate it to his own use, but does it openly and above board, he commits a forcible trespass. *State* v. *Sowls*, *ante*, 157.

Not necessary to prove actual force. If the acts of the defendants tended to a breach of the peace, they were guilty. *State* v. *Armfield*, 27 N. C., 211.

If Phipps was restrained from insisting on his rights by a conviction that it would be useless, and from a want of physical power to enforce them, and the blue-stone was taken from his presence and against his will, the defendants are guilty. *Ibid.* See also *State* v. *Ray*, 32 N. C., 39.

The guilt or innocence of the persons charged does not depend upon the right to the property or the right to its possession; but merely upon the fact of the possession. *State* v. *Burnett*, 20 N. C., 49.

No counsel, *contra.*

READE, J. Forcible trespass on personal property is the taking by force the personal property of another in his presence. The forcible taking is the ingredient which distinguishes the offence. "Putting in fear" is not necessary. If it were, then one man's guilt would depend upon another man's nerve. Force is necessary to constitute the offence, because it tends to a breach of the peace; and this is done whether the owner is (373) put in fear or not; and the rather if he is not put in fear.

His Honor who tried the case was evidently of the opinion that, in order to the guilt of the defendants, the owner of the property must have been "intimidated," or "alarmed." In this he was mistaken. It is only necessary that the force should be such as was calculated to intimidate or alarm or involve or tend to a breach of the peace.

Such were the facts of this case; and there was error in setting aside the verdict of guilty.

This opinion will be certified to the court below, to the end that said court may proceed according to law.

PER CURIAM. There is error.

Cited: State v *King*, 74 N. C., 179; *State* v. *Barefoot*, 89 N. C., 567; *State* v. *Mills*, 104 N. C., 907; *State* v. *Gray*, 109 N. C., 793; *State* v. *Davis*, *Id.*, 810, *State* v. *Lawson*, 123 N. C., 743.

JOSHUA H. FENTRESS v. WILLIAM BROWN.

A Constable does not subject himself to the penalty of $100 given by the Rev. Code, c. 34, s. 118, by declining to receive process which, at the time it was tendered, he could not have executed, *ex. gr.* process against a person then attending under subpœna before a commissioner.

DEBT for the penalty of $100, given by the Revised Code, chap. 34, sec. 118, tried before *Warren, J.*, at Spring Term, 1867, of the Superior Court of Randolph.

It was shown that one Marrow sued out a warrant, in the name of a firm to which he belonged, against one Gibson, and tendered it for execution to the defendant, a constable; that at the time it was so tendered Gibson was present (in New Salem, Randolph County), attending under subpœna as a witness before a commissioner to give evidence in behalf of the present defend- (374) ant in a cause to which he was a party, then pending in Randolph Superior Court; and that defendant declined to take such warrant. It was also in evidence that Gibson remained for several days thereafter in the county of Randolph.

The court instructed the jury that if they believed these facts, the plaintiff was entitled to their verdict.

Verdict accordingly. Rule for a new trial. Rule discharged. Judgment, and appeal by the defendant.

No counsel in this court for the appellant.
Gorrell, contra.

Although the warrant could not be executed at the time when it was tendered, yet the defendant was bound to receive it, unless it could not be executed within the thirty days during which it ran, and it appears that Gibson remained in the county for several days thereafter.

READE, J. By our statute a constable refusing or neglecting to return any precept to him tendered or delivered, which it is his duty to execute, forfeits to any one who will sue for the same, one hundred dollars. Rev. Code, chap. 34, sec. 118.

The question is, Did the defendant refuse to receive and execute process which it was his duty to execute?

The person against whom the process was issued that the defendant refused to receive, was, on the day and a the time when the process was tendered, in attendance on a commissioner as a witness; and our statute exempts witnesses thus attending from arrest in civil cases. Rev. Code, chap. 31, sec. 70. If, therefore, the defendant had received the process which was tendered to him, he could not have executed it. It was not only "his duty to execute it," but if he had executed it he would have been liable to an action for false imprisonment.

It was not denied by the plaintiff's counsel that (375) such would have been the result if he had executed the process on that day; but it was insisted that it was his duty to receive the process when tendered, and execute it at a subsequent time, when the person should be liable to arrest.

We do not think that an officer is liable to the penalty for not receiving process, unless it runs against a person who is then subject to it; or in the language of the statute, unless it is "his duty to execute" it then. If process were tendered to him on Sunday, he would not be obliged to receive it and hold it until Monday to execute it; so if tendered to him out of his county, to be executed when he returns to his county, he would not be obliged to receive it. It may be very obliging in an officer to make himself the depository of process and other papers which, on the next day or the next month he may execute; but he is certainly not liable to a penalty for declining thus to encumber himself with other persons' matters. It is to be noted that the plaintiff in this case is not the person who tendered the process to the defendant, but is a volunteer, a common informer. There is no allegation that he has been injured by the refusal of the defendant to receive the process; nor is it alleged that the process was tendered the next or any other day; nor does it appear that he did not receive it and execute it the next day. At any rate, the person who sued out the process does not complain. And the plaintiff insists that the offense was complete and the penalty incurred by the simple act of refusing to receive process on a day when it was unlawful for him to execute it. We think the defendant was not bound to receive the process at the time it was tendered.

It appears that the person against whom the process was issued was a witness for the present defendant in a suit which he had with another. And it may be that process was tendered to the defendant to execute upon his own witness, when it was unlawful to execute it, for the purpose of perverting justice by offending (376) the witness. If so, the plaintiff has very well merited the payment of the costs of this suit. At any rate, it does not appear that, either in strict law or plain justice, he is entitled to recover.

PER CURIAM. Judgment reversed and *venire de novo.*

STATE v. BANVESTER HAYWOOD.

1. Evidence making a mere ground for conjecture that a homicide was accidental, is to be regarded as no evidence.
2. Upon trials for murder, a killing by the prisoner having been proved, the burden of proof shifts to the prisoner.
3. When it was shown that the prisoner killed the deceased by shooting, and made his escape, and afterwards said he had killed deceased but did not know that the gun was loaded, the fact that the gun was out of order and would not stand at half-cock, did not make it error for the Judge to refuse to charge that "if the prisoner was handling the gun in a careless and negligent manner, and it accidentally went off, the killing was mitigated to manslaughter," there being no evidence of negligent handling or accident.
4. A charge upon the subject of insanity in criminal cases commended.

(*Sutton v. Madre*, 47 N. C., 320, cited and approved.)

MURDER, tried before *Green, J.*, at May Term, 1867, of the Criminal Court of Craven.

The prisoner, a colored man, was indicted for killing Tilicha Keyes, a colored woman. The deceased lived with the family of one Foreman, who kept a grocery. The prisoner and a brother had been drinking at the shop the day before the homicide. On the day of the homicide the prisoner had been in the shop, but went out and soon returned armed with a gun and pistol. As he entered he laid the pistol on the counter, and said, "What in the hell is that you say," holding the (377) muzzle of the gun to the head of the deceased and firing. She fell dead, and he immediately dropped the gun, took up the pistol and made his escape. He was arrested soon after, and made the declaration that he had killed the deceased but did not know that the gun was loaded. There was no evidence of ill-will or a quarrel between the prisoner and the deceased at any time.

It was in proof that the lock of the gun was out of order, and would not stand at half-cock. It was shown for the prisoner that his father was insane, and under confinement at the time of his death; that the prisoner's "disposition was peculiar"; also that he had taken no food on the day of the homicide.

The prisoner's counsel contended that there was evidence of the accidental firing of the gun, and asked the court to "charge that if the prisoner was handling the gun in a careless and negligent manner and it accidentally went off, the prisoner would not be guilty of murder, but of manslaughter." His Honor refused, on the ground that there was no evidence to sustain that view of the case. The prisoner excepted.

The prisoner's counsel contended that, "If subject to an insanity inherited from his father, the prisoner acted at the time under delusion excited by abstinence from food, and by the use of intoxicating liquors, amounting to insanity, he would be entitled to an acquittal." On this subject his Honor charged the jury as follows:

"That if the prisoner, at the time he committed the homicide, was in a state to comprehend his relations to other persons, the nature of the act and its criminal character, or, in other words, if he was conscious of doing wrong at the time he committed the homicide, he is responsible. But if, on the contrary, the prisoner was under the visitation of God, and could not distinguish between good and evil, and did not know what he did, he is not guilty of any offense against the law; (378) for guilt arises from the mind and wicked will.

Verdict of guilty. Judgment of death, and appeal.

Manly & Haughton, for the appellant.
Attorney-General, for the State.

PEARSON, C. J. The only ground taken in this court was that the Judge erred in declining to charge that, if the prisoner was handling the gun in a careless and negligent manner, and it accidentally went off, the killing was mitigated to manslaughter. His Honor refused so to charge, on the ground that there was no evidence to sustain that view of the case. There is no error.

The evidence relied on by the prisoner's counsel was "that the lock of the gun was out of order and it would not stand at half-cock." This evidence may have been ground for a "conjecture" that by possibility the gun went off accidentally, but standing alone it certainly was not evidence fit to be left to the jury, on which to find that such was the fact as the *onus* of proof lay upon the prisoner, the killing by him having been proved. *Sutton* v. *Madre*, 47 N. C., 320.

It is true that in making out a fact by circumstantial evidence, a matter, which taken by itself would be of no importance, frequently makes an important link in the chain of circumstances by being taken in connection with other circumstances; but there must be a chain leading to the fact to be established, and one link taken by itself amounts to nothing. For illustration: it is proved that a father killed his child with a gun; this puts the *onus* on him; he proves that the child was a favorite of his; that the lock of the gun was out of repair, so that it would sometimes go off at half-cock by a jar or sudden motion, and that, at the instant it went off, he made an exclamation of surprise and ex- (379) hibited the natural emotions of grief (which would be admissible as part of the *res gestæ*). Here is a chain of circumstances proper for the consideration of the jury. In our case there is a middle link, *i. e.*, the lock was out of order, and it would not stand at half-cock. But the prisoner is content with the fact that the State had offered no evidence of any ill will or quarrel between him and the deceased; so the link on that side is wanting, and, so far from there being a link on the other side so as to make a chain, the evidence is that, without expressing any surprise, he throws down the gun, picks up his pistol and makes his escape; and, even when arrested, puts his defence on the ground that he did not know that the gun was loaded. Thus the evidence in respect to the lock stands alone in reference to the allegation that the gun went off accidentally, and is hardly sufficient to suggest "a conjecture" that such might have been the fact.

We fully approve of the charge of his Honor upon the subject of insanity. It is clear, concise and accurate; and, as it is difficult to convey to the minds of jurors an exact legal idea of the subject, we feel at liberty to call the attention of the other Judges to this charge.

There is no error. This opinion will be certified to the end, etc.

PER CURIAM. There is no error.

Cited: *State* v. *Payne*, 86 N. C., 610; *State* v. *Brittain*, 89 N. C., 502; *State* v. *Mazon*, 90 N. C., 683; *State* v. *Jones*, 98 N. C., 656; *State* v. *Byers*, 100 N. C., 518; *State* v. *Potts*, *Id.*, 465; *State* v. *Davis*, 109 N. C., 784; *State* v. *Rollins*, 113 N. C., 734; *State* v. *Byrd*, 121 N. C., 686.

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MATILDA BROUGHTON and others v. E. G. HAYWOOD and others.

1. A Clerk and Master, who sold slaves under a decree in a petition for partition, and instead of taking bond as the decree directed, received cash, is, with his sureties, liable for the amount so received, upon motion for a summary judgment under Rev. Code, c. 78, s. 5; and this, whether an action on the bond would or would not lie for the money, as received "by virtue of his office."
2. The Military Order, No. 10, s. 2, (April 11, 1867), does not forbid the courts of the State to hear and try causes and render judgments and decrees; but it operates in analogy to injunctions against executions after judgment.
3. By PEARSON, C. J. The Clerk and Master, having sold according to the order, had a discretion to take cash instead of a bond and security, and was liable to a suit on his bond for money received by virtue of his office.
4. When a Clerk takes a bond payable six months after date, if the debtor tenders the money at the day, the Clerk is bound to receive it without waiting for an order for collection.

MOTION for a summary judgment under Rev. Code, chap. 78, sec. 5, tried before *Barnes, J.*, at Spring Term, 1867, of the Superior Court of Law for Wake.

The defendant Haywood was Clerk and Master in Equity for Wake County in 1860, and upon the renewal of his bond in that year, the other defendants became his sureties.

An *exparte* petition was filed in the Court of Equity for Wake, at Spring Term, by the plaintiffs (some of whom were minors) for the sale for partition of certain slaves owned by them as tenants in common. A decree was rendered at that term, for a sale upon six months' credit, bond and security to be given by the purchasers. The defendant Haywood reported to Fall Term, 1860, that he had made the sale and had taken bond and security from the purchasers, except in the cases of W. F. Askew and P. J. Sterne, who tendered the cash, amounting to $1,200, which was receivd. Among (381) the bonds taken was one given by James M. Harris. Haywood went out of office and his successor was appointed at Fall Term, 1860 Subsequent to that term Harris paid to Haywood $50, which was credited on his bond before it was deliverd to the successor. None of this purchase-money was paid into court. At Fall Term, 1862, the sale was confirmed, and an order made granting the petitioners leave to bring suit upon the bond of the Clerk and Master in a court of law.

The petition, the report of the sale and the several orders referrd to were introduced in support of the motion.

His Honor allowed the motion and gave judgment for the sums paid by Askew and Sterne, and the $50 paid by Harris, with interest. The defendants appealed.

Moore, and *Rogers & Batchelor*, for the appellants

1. The money for which the slaves were sold was not received under color of the Master's office. *Kesler* v. *Long*, 29 N. C., 379; *Ellis* v. *Long*, 30 N. C., 573; *State* v. *Long*, *Id.*, 415; *State* v. *Brown*, 33 N. C., 141; *White* v. *Smith*, 46 N. C., 4; *Holloman* v. *Langdon*, 52 N. C., 49; *Miles* v. *Allen*, *Ib.*, 564.

2. The sale was not confirmed until two years after it was made and after the defendant Haywood had gone out of office, and the petitioners still insisted the decree should be performed in its letter, proceedings being instituted against Askew to compel him to give his bonds. See 62 N. C., 21. There was no notification by the court of the departure by the Master from the decree. The case stands upon the basis that the Master received the money under color of his office.

3. No notification after the Master went out of office can affect his official deeds or the sureties on his bond. Story on Agency, secs. 245-246 and 440.

4. Confirmations shall not have relation to the prejudice of another. 2 Th. Co. Litt., 550, Note P. 1, 543, Note K. 1. If such confirmations when clearly made should have this relation they are not readily presumable, because of their injury to private rights.

5. The words "by virtue" and "under color" mean the same thing. This is apparent from reading secs. 4,

5 and 6 (chap. 78, Rev. Code), together. The fourth was intended for small claims, the fifth for large ones, and the sixth to give 12 per cent damages; and it could not have been intended to give a summary judgment for an act done under color, which could not have recovered by suit on the bond. The sole object of the action by motion was to expedite justice, and not to alter the rule of administering it. The plaintiffs are not excused from assigning the breach of the condition of the bond for which they seek to recover, nor are the defendants deprived of any defence they would have were the action debt on the bond. If any issue of fact is made up, the trial must be by jury, and the jury must find the damages. *State Bank* v. *Davenport*, 19 N. C , 45; *Buchanan* v. *McKenzie*, 53 N. C., 91

Bragg, *Lewis* and *Phillips & Battle*, *contra.*

READE, J. For the defendant it was insisted that no recovery could be had by this proceeding, unless the same could be had in an action of debt upon his official bond; and many authorities were cited to show that, in an action upon the bond, no recovery can be had except for some liability incurred by virtue of the office, and that "by virtue of the office" means in the rightful discharge of its duties; as, for instance, money rightfully collected, and not for money wrongfully collected.

It must be admitted that in a suit on the bond there can be no recovery, except for some breach of the bond; and the bond is "conditioned for the safe keeping of the records, the due collection, accounting for and paying all moneys which may come into his hands by (383) virtue of his office, and for the faithful discharge of the duties of his office in all respects whatever." In order to recover in a suit upon the bond, it is necessary to show either: 1. That he did not keep the records. 2. That he did not collect. 3. That he did not account for and pay money which came into his hands by virtue of his office. 4. Or that he neglected to discharge the duties of his office. And then it is insisted that what is charged against the defendant is not a breach of his bond in any of these particulars. Questions upon the liability of officers on their bonds have been so often before the court, and so fully discussed in the cases cited at the bar, that we forbear any further discussion of them in this case. Nor do we think it necessary to decide whether the act complained of was a breach of the bond, because the defendant may be subjected in this proceeding to a liability which could not be assigned as a breach of his bond. The difference is, that in a suit on the bond the act complained of must be done by virtue of his office; in this proceeding it is sufficient if done by virtue, or under color, of his office. Rev. Code, chap. 78, sec. 5.

But the defendants insist that by virtue and under color mean the same thing. They mean very different things. For instance, the proper fees are received by virtue of the office; extortion is under color of the office. Any rightful act in office is by virtue of the office A wrongful act in office may be under color of the office. Color in law means not the thing itself, but only an appearance thereof; as, color of title means only the appearance of title. In the case before us the defendant sold the property as Clerk and Master, received the money and gave a receipt for it as Clerk and Master, and yet, because he received it before it was due, and before he was ordered to receive it, he insists that he received it wrongfully, when he had no right to receive it as Clerk and Master, and that, therefore, he did not receive it by virtue of his office, and that there is
(384) no breach of his bond in not accounting for it.

Now, suppose that to be true, can it be said that he did not receive it under color of his office? Did he not appear to be acting officially? It is not denied that he professed to be, and that he appeared to be, acting officially. And, as sworn officers are presumed to do their official duties correctly, and as every reasonable intendment must be made in favor of their acts, we are to presume that he not only appeared to be acting by virtue of his office, but that he really thought he was acting rightfully. To suppose the contrary would be to impute a grave offense. "For the justices did ever appoint their clerks, some of which after grew by prescription to be officers in their courts. And they did ever appoint those who had the greatest knowledge and skill. And they are to enter, enroll, or effect that which the justices do adjudge, award, or order; the insufficient doing whereof maketh the proceedings of the justices erroneous; than the which nothing can be more dishonorable and grievous to the justices, and prejudicial to the party." Bac. Abr., Title "Offices," L. D.

Whether or not the defendant received the money by virtue of his office so as to make him liable in a suit on his bond, we are clearly of the opinion that he did receive it by color of his office, and that he and his sureties are liable in this proceeding.

After the opinions in this case were filed, our attention was called by Mr. Moore to the order of General Sickles, No. 10, sec. 2. We do not consider that order as forbidding the several courts in the State from proceeding with the trial of cases at law or the hearing of cases in equity and rendering judgments and decrees thereon; but that it forbids execution to issue—in analogy to injunction cases when the court proceeds to judgment and the execution is enjoined.

In the case before us, section 16 of the order has application, the proceeding being in behalf of a minor, and minors come of age, against a Clerk and Master. So, although there are other parties who are (385) adults, it is nevertheless necessary for the court to decide the case which is before us by appeal and give judgment, that execution may issue in favor of the minors.

This is our view on the supposition that the cause of action did not accrue until after the 19th December, 1860. That depends upon whether the default was in receiving the money in the first instance, instead of taking bond and security (in May, 1860), or in failing to pay over when called on after the year 1860. We are now, however, called on to decide the question, as in either point of view we are of opinion that the order does not forbid the court from rendering judgments and decrees, but only suspends the issuing of execution.

PEARSON, C. J. I concur in the conclusion that the defendants are liable to judgment for the money on motion, but I am of opinion also that the money was received "by virtue of his office," and that the defendant Haywood and his sureties might have been subjected by suit on his official bond.

The slaves were sold for the purpose of partition, and the object of directing the clerk to sell on six months' credit, taking bond and security with interest from date, was not to make an investment, but to enhance the price, by enabling those who did not have the cash in hand to become bidders, so as not to confine the bidding to those who had the cash.

The Clerk and Master made the sale according to his order, on six months' credit. When asked if those who had the cash but were not in a condition to give bond with security, were at liberty to bid, he told them that, as a matter of course, their bids would be accepted. Suppose he had refused to take such bids; evidently the number of bidders would have been diminished, and the purpose of enhancing the price would have been defeated. So, it seems to me, that he put the proper construction upon his order to sell. He thought so, (386) for his report set out that certain bidders paid cash. Had he refused cash bidders, he would have been amenable to the charge of "sticking in the bark," to the prejudice of those for whom he was acting, just as much as if he had made a cash sale, and thereby excluded from bidding all who were not prepared with the money; for it was known many negro-traders were prepared to pay cash, but could not give security; and the order was shaped so as, by its proper construction, to include both classes of bidders. I think, therefore, that in making the sale on six months' credit, with the understanding that all who chose might pay the cash instead of giving bond and security, and also in receiving the money, the clerk acted in conformity with his order, and received the money by virtue of his office, and his default was in not paying it over when it was called for.

For what reason has the sale to be made on six months' credit, taking bond and security with interest from date, and why should the Clerk and Master be held to the letter, and not be allowed to exercise his judgment as to the true construction of the order of sale? Was it because he was considered unfit to be trusted with the money? No! For his official bond secured that. Was it for the sake of making $30 interest on $1,000? No! For an investment of the fund was not in contemplation of the court. So the object was to enhance the prices by increasing the number of bidders. That was best promoted by letting in cash bidders as well as credit bidders, which more than compensated for a loss of $30 interest, to say nothing of the delay and expense of collection. Thus the gravamen is, that in this instance the funds have been misapplied But for that, it would have been "all right." I think the case is like that of an executor or administrator who sells on six months' credit, as required by the statute, but allows some bidders to pay cash.

I am also of opinion that when a clerk takes a bond payable say six months after date, if the debtor (387) tenders the money at the day, the clerk is bound by the contract to receive it, and is not required to wait for an "order of collection." In other words, an order to collect is necessary, not to give the clerk authority to receive the money when a bond falls due, but to instruct him to bring suit on the bond, and compel payment. Consequently all such payments are received by him *virtute officii*, and accountability is secured by his official bond.

PER CURIAM. There is no error.

Cited: State v. *Morrison*, 63 N. C., 510; *Greenlee* v. *Sudderth*, 65 N. C., 473; *Brown* v. *Coble*, 76 N. C., 393; *Varner* v. *Arnold*, 83 N. C., 209; *Thomas* v. *Connelly*, 104 N. C., 349.

APPENDIX.

[By direction of the Court, the Reporter adds to this number the address delivered to the bar attending the Circuit Court of the United States for this District, by his Honor the Chief Justice of the United States, upon the first day of his attendance during the term in June, 1867; and also an opinion by the Circuit Court upon an interesting case which came before it during that term.

Upon Thursday, the 6th of June, their Honors, Chief Justice Chase and Judge Brooks, with a numerous attendance of the bar, being present, the Chief Justice read the following address:]

Gentlemen of the Bar:—Before proceeding to regular business, I think it proper to address a few observations to you:

For more than four years the Courts of the Union were excluded from North Carolina by rebellion. When active hostilities ceased, in 1865, the national military authorities took the place of all ordinary civil jurisdiction, or controlled its exercise. All Courts, whether State or National, were subordinated to military supremacy: and acted, when they acted at all, under such limitations and in such cases as the Commanding General, under the direction of the President, thought fit to prescribe. Their process might be disregarded, and their judgments and decrees set aside by military orders. Under these circumstances the Justices of the Supreme Court, allotted to the Circuits which included the insurgent States, abstained from joining the District Judges in holding the Circuit Courts.

Their attendance was unnecessary, for the District Judges were fully authorized by law to hold the Circuit Courts without the Justices of the Supreme Court, and to exercise complete jurisdiction in the trial of all criminal, and almost all civil causes. And their attendance was unnecessary for another reason. The military tribunals at that time, and under the existing (390) circumstances, were competent to the exercise of all jurisdiction, criminal and civil, which belongs, under ordinary circumstances, to civil courts.

Being unnecessary, the Justices thought that their attendance would be improper and unbecoming. They regarded it as unfit in itself and as injurious, many ways, to the public interests, that the highest officers of the Judicial Department of the Government should exercise their functions under the supervision and control of the executive Department.

At length, however, the military control over the civil tribunals was withdrawn by the President. The writ of *habeas corpus*, which had been suspended, was restored, and military authority in civil matters was abrogated. This was effected, partially, by the Proclamation of April 2, and fully, by the Proclamation of August 20, 1866.

These proclamations reinstated the full authority of the National Courts in all matters within their jurisdiction; and the Justices of the Supreme Courts expected to join the District Judges in holding the Circuit Courts, during the interval between the terms at Washington.

On the 23d of July, 1866, however, act of Congress reduced the number of the Circuits, and changed materially the Districts of which the Southern Circuits were composed, without making or providing for an allotment of the members of the Supreme Court to the new Circuits; and without such allotment the Justices of that court have no Circuit Court jurisdiction. The effect of the act therefore was to suspend the authority of Justices to hold the Circuit Courts in the altered Circuits.

This suspension was removed by the Act of March 2, 1867, by which a new allotment was authorized. Under this act the Justices of the Supreme Court have been again assigned to Circuit duties; and the Chief Justice has been allotted to hold, with the District Judges, (391) the National Courts in the Circuit of which the District of North Carolina is made a part.

I am here, therefore, to join my brother, the District Judge, in holding the Circuit Court for this district. It is the first Circuit Court held in any district within the insurgent States, at which a Justice of the Supreme Court could be present, without disregard of superior duties at the seat of government or usurpation of jurisdiction.

The Associate Justices allotted to the other Southern Circuits will join in holding the courts at the regular terms prescribed by law, and thus the national civil jurisdiction will be fully restored throughout the Union.

It is true that military authority is still exercised within these Southern Circuits; but not now as formerly, in consequence of the disappearance of local civil authority, and in supervision or control of all tribunals, whether State or National. It is now used under acts of Congress, and only to prevent illegal violence to persons and property, and to facilitate the restoration of every State to equal rights and benefits in the Union. This military authority does not extend in any respects to the Courts of the United States.

Let us hope that henceforth neither rebellion nor any other occasion for the assertion of any military authority over courts of justice, will hereafter suspend the due course of judicial administration by the national tribunals in any part of the Republic.

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SHORTRIDGE & CO. v. T. B. MACON.

1. Compulsory payment of a debt to a receiver under the Sequestration Acts of the Confederate Government is no defence to a suit brought upon such debt by the creditor.
2. The suspension of intercourse consequent upon the recent war did not prevent interest from accruing between citizens adhering to the respective parties thereto.

(Discussion and statement of the principles, in regard to treason, etc., which affect the position of those who took part against the United States in the late war.)

ASSUMPSIT, in which the plaintiffs declared upon a note executed by the defendant in 1860.

The plaintiffs were citizens of Pennsylvania at the time the note was given, and continued to be such until the bringing of the suit; and during that time the defendant continued to be a citizen of North Carolina.

Among other pleas, the defendant relied upon the fact that during the existence of the late government of the Confederate States, and by virtue of certain acts of Congress under that government, this debt had been confiscated, and he compelled by process to pay it into its public treasury. It was also insisted that the state of things consequent upon the recent war between the United States and the Confederate States, was such as to excuse the defendant from payment of interest accruing during that period.

Bragg, for the plaintiffs.
Rogers & Batchelor, for the defendant.

CHASE, C. J. This is an action for the recovery of the amount of a promissory note with interest.

There is no question of the liability of the defendant to the demand of the plaintiffs, unless he is excused by coerced payment of the note sued upon, under an (393) act of the self-styled Confederate Congress, passed August 30, 1861, entitled "An act for the sequestration of the estates of alien enemies," and an amendatory act passed February 15, 1862.

It is admitted that the plaintiffs were citizens of Pennsylvania; that the defendant was a citizen of North Carolina; that the note sued upon was made by the defendant to the plaintiffs; and that the defendant was compelled, by proceedings instituted in the courts of the so-called Confederate States, to pay the amount due upon it to the receiver appointed under the sequestration acts.

Upon these facts it is insisted that the defendant is discharged from his liability to the plaintiffs. It is claimed that, while it existed, the Confederate government was a *de facto* government; that the citizens of the States which did not rcognize its authority were aliens, and in time of war, alien enemies; that, consequently, the acts of sequestration were valid acts; and, therefore, that payment to a Confederate agent of debts due to such citizens, if compelled by proceedings under those acts, relieved the debtor from all obligations to the original creditors.

To maintain these propositions, the counsel for the defendant rely upon the decisions of the Supreme Court of the United States, to the effect that the late rebellion was a civil war, in the prosecution of which belligerent rights were exercised by the National Government, and accorded to the armed forces of the rebel Confederacy; and upon the decisions of the State Courts, during and after the close of the American war for independence, which affirmed the validity of confiscations and sequestrations decreed against the property of non-resident British subjects and the inhabitants of colonies or States hostile to the United Colonies or United States.

But these decisions do not, in our judgment, sustain the propositions in support of which they are cited.

There is no doubt that the State of North Carolina, by the acts of the Convention of May, (394) 1861, by the previous acts of the Governor of the State, by subsequent acts of all the departments of the State government, and by the acts of the people at the elections held after May, 1861, set aside her State government and Constitution connected under the National Constitution with the government of the United States, and established a new Constitution and government connected with another so-called central government, set up in hostility to the United States, and entered upon a course of active warfare against the national government. Nor is there any doubt that by these acts the practical relations of North Carolina to the Union were suspended, and very serious liabilities incurred by those who were engaged in them.

But these acts did not effect, even for a moment, the separation of North Carolina from the Union, any more than the acts of an individual who commits grave offences against the State, by resisting its officers and defying its authority, separate him from the State. Such acts may subject the offender even to outlawry, but can discharge him from no duty and can relieve him from no responsibility.

The National Constitution declares that "treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort."

The word "only" was used to exclude from the criminal jurisprudence of the new Republic the odious doctrines of constructive treason. Its use, however, while limiting the definition to plain overt acts, brings these acts into conspicuous relief as being always, and in essence, treasonable.

War, therefore, levied against the United States by citizens of the Republic, under the pretended authority of the new State government of North Carolina, or of the so-called Confederate government which assumed the title of the "Confederate States," was treason against the United States.

(395) It has been supposed, and by some strenuously maintained, that the North Carolina Ordinance of 1861—which purported to repeal the North Carolina Ordinance of 1789, by which the Constitution of the United States was ratified, and to repeal also all subsequent acts by which the assent of North Carolina was given to amendments of the Constitution—did in fact repeal that Ordinance and those acts, and thereby ab-

solved the people of the State from all obligation as citizens of the United States, and made it impossible to commit treason by levying war against the National government.

No elaborate discussion of the theoretical question thus presented seems now to be necessary. The question as a practical one is at rest, and is not likely to be revived. It is enough to say here that, in our judgment, the answer which it has received from events is that which the soundest construction of the Constitution warrants and requires.

Nor can we agree with some persons, distinguished by abilities and virtues, who insist that when rebellion attains the proportions and assumes the character of civil war, it is purged of its treasonable character, and can only be punished by the defeat of its armies, the disappointment of its hopes and the calamities incident to unsuccessful war.

Courts have no policy and can exercise no political powers. They can only declare the law. On what sound principle, then, can we say judicially that the levying of war ceases to be treason when the war becomes formidable? that war, levied by ten men or ten hundred, is certainly treason, but is no longer such when levied by ten thousand or ten hundred thousand? that the armed attempts of a few, attended by no serious danger to the Union, and suppressed by slight exertions of the public force, come, unquestionably, within the constitutional definition, but attempts by a vast combination, controlling several States, putting great armies in the field, menacing with imminent
(396) peril the very life of the Republic, and demanding immense efforts and immense expenditures of treasure and blood for their defeat and suppression, swell beyond the boundaries of the definition and become innocent in proportion to their enormity?

But it is said that this is the doctrine of the Supreme Court. We think otherwise.

In modern times it is the usual practice of civilized governments attacked by organized and formidable rebellion, to exercise and to concede belligerent rights. Under such circumstances, instead of punishing rebels when made prisoners of war as criminals, they agree on cartels for exchange, and make other mutually beneficial arrangements; and, instead of insisting upon offensive terms and designations, in intercourse with the civil or military chiefs, treat them, as far as possible without surrender of essential principles, like foreign foes engaged in regular warfare.

But these are concessions made by the Legislative and Executive Departments of government in the exercise of political discretion and in the interest of humanity, to mitigate vindictive passions inflamed by civil conflicts, and prevent the frightful evils of mutual reprisals and retaliations. They establish no rights except during the war.

It is also true that when war ceases, and the authority of the regular government is fully re-established, the penalties of violated law are seldom inflicted upon many.

Wise governments never forget that criminality of individuals is not always or often equal to that of the acts committed by the organization with which they are connected. Many are carried into rebellion by sincere though mistaken convictions; or hurried along by excitements due to social and State sympathies, and even by the compulsion of a public opinion not their own.

When the strife of arms is over, such governments, therefore, exercising still their political (397) discretion, address themselves mainly to the work of conciliation and restoration, and exert the prerogative of mercy, rather than that of justice. Complete remission is usually extended to large classes by amnesty or other exercise of legislative or executive authority, and individuals not included in these classes, with some exceptions of the greatest offenders, are absolved by pardon, either absolutely or upon conditions prescribed by the government.

These principles, common to all civilized nations, are those which regulated the action of the government of the United States during the war of the rebellion, and have regulated its action since rebellion laid down its arms.

In some respects the forbearance and liberality of the nation exceed all example. While hostilities were yet flagrant, one act of Congress practically abolished the death penalty for treason subsequently committed, and another provided a mode in which citizens of rebel States, maintaining a loyal adhesion to the Union, could recover after war the value of their captured or abandoned property.

The National Government has steadily sought to facilitate restoration with adequate guaranties of union, order and equal rights.

On no occasion, however, and by no act, have the United States ever renounced their constitutional jurisdiction over the whole territory or over all the citizens of the Republic, or conceded to citizens in arms against their country the character of alien enemies, or admitted the existence of any government *de facto* hostile to itself within the boundaries of the Union.

In the Prize cases the Supreme Court simply asserted the right of the United States to treat the insurgents as belligerents, and to claim from foreign nations the performance of neutral duties under the penalties known to international law. These decisions recognized, (398) also, the fact of the exercise and concession of belligerent rights, and affirmed, as a necessary consequence, the proposition that during the war all the inhabitants of the country controlled by the rebellion, and all the inhabitants of the country loyal to the Union, were enemies reciprocally each of the other. But there is nothing in that opinion which gives countenance to the doctrine which counsel endeavor to deduce from it—that the insurgent States, by the act of rebellion, and by levying war against the nation, became foreign States, and their inhabitants alien enemies.

This proposition being denied, it must result that in compelling debtors to pay to receivers, for the support of the rebellion, debts due to any citizen of the United States, the insurgent authorities committed an illegal violence, by which no obligation of debtors to creditors could be cancelled or in any respect affected.

Nor can the defence in this case derive more support from the decisions affirming the validity of confiscations during the war for American Independence.

That war began, doubtless, like the recent civil war—in rebellion. Had it terminated unsuccessfully, and had English tribunals subsequently affirmed the validity of colonial confiscation and sequestration of British property and of debts due to British subjects, those decisions would be in point. No student of international law or of history needs to be informed how impossible it is that such decisions could have been made.

Had the recent rebellion proved successful, and had the validity of the confiscations and sequestrations actually enforced by the insurgent authorities, been afterwards questioned in Confederate Courts, it is not improbable that the decisions of the State Courts made during and after the revolutionary war, might have been cited with approval.

(399) But it hardly needs remark that those decisions were made under circumstances widely differing from those which now exist.

They were made by the courts of States which had succeeded in their attempt to sever their colonial connection with Great Britain, and sanctioned acts which depended for their validity wholly upon that success; and can have no application to acts of a rebel self-styled government, seeking the severance of constitutional relations of States to the Union but defeated in the attempt, and itself broken up and destroyed.

Those who engage in rebellion must consider the consequences. If they succeed, rebellion becomes revolution, and the new government will justify its founders.

If they fail, all their acts hostile to the rightful government are violations of law, and originate no rights which can be recognized by the courts of the nation whose authority and existence have been alike assailed.

We hold, therefore, that compulsory payment under the sequestration acts to the rebel receiver of the debt due to the plaintiffs from the defendant, was no discharge.

It is claimed, howeer, that, whatever may be the right of the plaintiffs to recover the principal debt from the defendant, they can not recover interest for the time during which war prevented all communication between the States in which they respectively resided.

We can not think so. Interest is the lawful fruit of principal. There are, indeed, some authorities to the point that interest which has accrued during war between independent nations can not be afterwards recovered, though the debt, with other interest, may be. But that rule, in our judgment, is applicable only to such wars. We perceive nothing in the Act of the 13th July, 1861, which suspended for a time all pacific intercourse between the loyal and insurgent portions (400) of the country, that requires or justifies the application of that rule to the case before us. Legal rights could neither be originated nor defeated by the action of the central authorities of the late rebellion

The plaintiff must have judgment for the principal and interest of his debt, without deduction.

PER CURIAM. Judgment accordingly.

CASES AT LAW

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA,

AT RALEIGH.

JANUARY TERM, 1868.

THE STATE v. RUFUS LUDWICK.

1. What was said by a third person in the presence and the hearing of the prisoner may be given in evidence against him.
2. The husband of one charged as an accessory is not a competent witness in favor of the one charged as the principal felon.

(*State v. Duncan*, 28 N. C., 98; *State v. Tom*, 13 N. C., 569; *State v. Mainor*, 28 N. C., 340; *State v. Parham*, 50 N. C., 416, cited and approved.)

MURDER, tried before *Gilliam, J.*, at Fall Term, 1867, of the Superior Court of Rowan.

The indictment charged the prisoner as principal and his mother as accessory before the fact, in the murder of Cornelia Ludwick, his wife. Upon application of the mother, there was a severance in the trials. The prisoner and his wife had been married only eleven days at the time of her disappearance, and were living with his father. Nine days after her disappearance her dead body was found in the Yadkin, about a mile from the prisoner's residence. She had been shot through the head, and her throat had been cut.

The State relied upon circumstantial testimony in order to procure a conviction.

It was shown that the prisoner was much under his mother's control, and that she was greatly dis-(402) pleased with the marriage, and would not permit deceased to eat at the table or to sleep in the house. A witness proved that on the fourth day after the marriage he visited the house and found the deceased standing out in the yard, in a hard rain, whilst the prisoner and his mother were sitting in the porch. Upon the witness asking prisoner why he did not ask his wife in, out of the rain, the mother said, No such d—d bitch shall come into my house; and prisoner said nothing. The prisoner objected to this evidence of what his mother said, but the court received it.

The prisoner, among various contradictory accounts which he gave of his wife's disappearance, said that his father had shot her. On his saying this at one time in his father's presence, the latter indignantly denied it. The prisoner objected to the evidence of what his father had said, but it was received by the court

The prisoner offered his father as a witness, but upon his being objected to by the State, the court excluded him. The prisoner excepted.

Verdict, Guilty. Rule for a new trial discharged. Judgment, and appeal.

Boyden & Bailey, for the prisoner.

The English decisions upon the two statutes from which our recent act in regard to evidence is taken (Lord Denman's and 14 and 15 Victoria) do not apply here, as the form in which our legislation in this case has been cast differs from the English so much that it may be considered original.

The exceptions in our act are only in case husband or wife is the party upon trial. In that case the elementary books put the former exclusion upon public policy; in other cases upon interest. The Act of 1866 removes the disability of interest in all cases.

(403) The act is broad enough to include co-defendants; and the exclusions are only where one is called upon to testify for or against himself. In this case the mother might have been indicted for a substantive felony, and in such case her husband's evidence upon her son's trial would be *res inter alios.*

Attorney-General and *Batchelor*, *contra.*

The wife here is indicted as an accessory, and not for a substantive felony; and in such case neither she nor her husband was formerly competent as a witness for the principal. 1 Gr. Ev., § 407; *State* v. *Duncan*, 28 N. C., 296; *State* v. *Chittem*, 13 N. C., 49; *State* v. *Jolly*, 20 N. C., 110; *State* v. *Smith*, 24 N. C., 402; *Rex* v. *Smith*, 1 Moody Cr. Ca., 289; Webb's case, 2 Russ. Cr., 982.

The husband has not been rendered competent by the act of 1866. His exclusion in cases affecting his wife is on account of public policy, and therefore is not touched by our act, which was intended, upon its face, to do away with such disabilities only as result from interest or from crime. *Stapleton* v. *Croft*, 83 Eng. Com. Law, 367; *Barbut* v. *Allen*, 10 Eng. L. & E., 596; *Alcock* v. *Alcock*, 12 Eng. L. & E., 354.

PEARSON, C. J. The first exception, as to the admissibility of what the witness Linebarger said to the prisoner, and the reply made by the mother of the prisoner in his presence, and also the second exception, as to the admissibility of the fact that the prisoner charged his father as the murderer, and that his father, being present, indignantly denied it, were properly abandoned in this court.

So the only point is, the rejection of the father when offered by the prisoner as a witness in his behalf. We think the witness ought to have been rejected.

(404) The prisoner was indicted as principal, and his mother, the wife of the witness, was indicted as accessory before the fact. The prisoner was alone on trial; and the question is, Was the husband called to give evidence for the wife? That depends upon, whether evidence for the prisoner was evidence for her; and that depends upon whether the acquittal of the prisoner would in its legal effect be an acquittal of the wife.

At common law an accessory before the fact could not be convicted, unless the principal when tried at the same time was first convicted; or unless he had been before tried, convicted, and received judgment. *Duncan's case*, 28 N. C., 98. That decision called for legislative interference; and to remedy the defect in the common law, it was enacted, Rev. Code, chap. 34, sec. 53, that "any person counselling, etc., the commission of a felony, shall be deemed guilty of felony, and may be indicted and convicted, either as accessory before the fact to the principal felony, together with the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted or shall or shall not be amenable to justice." This statute alters the common law, and puts out of the way the necessity of a prior conviction and attainder of the principal felon; but it has not even the most remote bearing upon a case where the prisoner charged as principal felon has been tried and acquitted. That is left as at common law, and the motion that when it is decided by the judgment of the law that no felony has been committed, and that the person charged as the principal felon is not guilty, one charged as being accessory before the fact can be tried and convicted, is out of the question, for there is no fact and no principal. That an acquittal of the principal is an acquittal of the accessory is settled by all of the books—2 Hawk, P. C., Chap. 29, sec. 40; 4 Rep., (405) 43, in which latter book my Lord Coke says that the maxim of the law is, "*ubi factum nullum, ibi fortia nulla; et ubi non est principalis non potest esse accessorius.*" This maxim is extended to all offences which can not be committed except by more than one person. *In Tom's case*, 13 N. C., 569, it is held in an indictment for a conspiracy against two, that the acquittal of one is the acquittal of the other. So in *Mainor's case*, 28 N. C., 340, and *Parham's case*, 50 N. C., 416 (indictments for fornication and adultery)—it is held that an acquittal of one is an acquittal of the other; for it takes two to commit the offence, and when it is fixed by judgment at law that one is not guilty, it follows that the other can not be guilty; and in Mainor's case, *supra*, although the jury found the man guilty, yet as they found the woman not guilty, it was held to be an acquittal of both, upon the settled rule in regard to the acquittal of the principal being in legal effect the acquittal of the accessory.

It is therefore perfectly clear that if the prisoner had been acquitted, it would have been an acquittal of the wife of the witness, consequently the witness was called to give evidence for his wife.

We find nothing in the Act of 1866, chap. 43, "An act to improve the law of evidence," to change this view of the subject, for in section 3 it is provided that "nothing contained in the second section of this act shall render any person competent or compellable in a criminal proceeding to give evidence for or against himself, or any husband competent or compellable to give evidence for or against his wife," etc. Suppose the mother had been called to give evidence for the prisoner, she was incompetent, as it would be giving evidence for herself, and, for the like reason the husband was incompetent, and could not give evidence for his wife.

There is no error. This will be certified to the end, etc.

PER CURIAM. There is no error.

Cited: State v. *Rose*, *post*, 409; *State* v. *Mooney*, 64 N. C., 56; *State* v. *Gardner*, 84 N. C., 735; *State* v. *Rowe*, 98 N. C., 633; *State* v. *Jones*, 101 N. C., 722; *State* v. *DeGraff*, 113 N. C., 692.

(406)

STATE v. WILLIAM D. ROSE and RICHARD VAUGHAN.

Where two or more persons are on trial under one indictment for the same offence they are, by the act of 1866, ch. 43, competent and compellable to give evidence for or against each other, though one of them can not be a witness for or against himself, or for or against his wife (and *e converso*), and is not compellable to answer any question tending to criminate himself.

(*State v. Ludwick, ante*, 401, cited and approved.)

LARCENY, tried before *Fowle, J.*, at Fall Term, 1867, of the Superior Court of Northampton.

Upon the trial each defendant offered to introduce his co-defendant, and also the wife of his co defendant as witnesses, for himself but not for such co-defendant. His Honor rejected the witness thus offered. The evidence being circumstantial, the defendants also proposed to prove that other persons lived nearer than themselves to the house where the theft was committed, and that the character of some of those persons was bad for honesty. The court rejected the proof, and the defendants again excepted. Verdict of guilty. Judgment, and appeal.

Merrimon, for the appellants.
Attorney-General, contra.

1. The punishment is authorized by Act of Assembly, 1866-'67, chap. 30.

2. The "Act to improve the law of evidence," ratified the 12th March, 1866, chap. 43, is the Act of 14 and 15 Victoria, and does not change the law of evidence as applicable to this case *State* v. *Mills*, 13 N. C., 420; *State* v. *Chitty, Id.*, 453; *State* v. *Smith*, 24 N. C., 405; *Powell on Evidence*, Law Lib., Vol. 86, page 37; *Rex* v. *Smith and others*, 2 Eng. Cr. Cas., 280.

(407) PEARSON, C. J. Although the second and third sections of the Act of 1866, chap. 43, entitled "An act to improve the law of evidence," corresponds substantially with the Act 14 and 15 Victoria, yet the

preamble, and the first and fourth sections, give to the act a character of its own: so it must be construed by itself, and the court can derive but little aid from the decision of other courts.

Our statute, by its preamble, sets out an intention to take away the objection to witnesses, on the ground of incompetency, and put it merely on the ground of credit, both in civil and criminal cases—to abrogate the rules of evidence, which had been fixed by the fathers of the law with a view to exclude falsehood even at the risk of sometimes excluding truth, and to admit truth at all hazards, although the door for the admission of falsehood should thereby be spread wide open.

Accordingly, it is enacted by the first section that no person offered as a witness shall be excluded from "giving evidence on the trial of any issue, or any matter or question arising in any suit or proceeding, civil or criminal, in any court, or before any judge, justice or jury, etc., on the ground of incompetency by reason of interest or crime." And by the second section it is enacted that, on the trial of any issue, or of any matter or question arising in any suit or other proceeding in any court, or before any judge, justice or jury, etc., the parties and the person in whose behalf any suit or other proceeding may be brought or defended, shall, "except as hereinafter provided," be competent and compellable to give evidence in behalf of either or any of the parties to said suit or other proceeding."

It will be seen that this section corresponds precisely in the general terms used with the first section, only omitting the words "civil or criminal," in their connection with "any suit or other proceeding." Had (408) the statute stopped at the second section, the omission of these two words might have given rise to some slight difficulty as to the construction; but the words "except as hereinafter provided," followed by the third and fourth sections, remove all difficulty whatever and make it manifest that parties on the record, as well in criminal as in civil proceedings, are made competent and compellable to give evidence except as provided in the third and fourth sections.

By the third section it is enacted, that nothing in the second section shall render any person who in any criminal proceeding is charged with the commission of an indictable offence, competent or compellable to give evidence for or against himself, or shall render any person compellable to answer any question tending to criminate himself; or shall, in any criminal proceeding, render any husband competent or compellable to give evidence for or against his wife," etc.

By the fourth section it is enacted that nothing contained in the second section shall apply to any proceeding instituted in consequence of adultery, or to any action for breach of promise of marriage.

These exceptions clearly prove the general rule, and leave no sort of doubt that it was the intention to make parties who are on trial for the same criminal offence charged in the same indictment, competent and compellable to give evidence for or against each other, save that a party is not to give evidence for or against himself, or for or against his wife (and *e converso*), and is not compellable to answer any question tending to criminate himself.

Indeed, this conclusion in regard to the competency of parties to the record would have almost followed from a proper construction of the first section, for the rule which excludes parties of record is based on the ground of interest or crime; the indictment found raising a presumption of guilt against all of them, they (409) were all considered infamous, and for that reason incompetent apart from the question of interest; and as the first section removes incompetency forcrime, it would seem to sweep away the rule as to parties of record, which is a mere corollary to it.

In *State* v. *Ludwick*, *ante*, 401, we had decided, before this case was called for argument, that a distinction is to be taken between those offences, where the acquittal of one is in legal effect the acquittal of the other, as in case of principal and accessory before the fact, conspiracy, fornication and adultery and those offences where one may be innocent and the other guilty.

These two cases put a full construction on the statute, and, whatever doubts we may entertain as to its wisdom, we feel satisfied that we have discharged our duty in giving full effect to the intention of the lawmakers.

It is unnecessary to notice the other exceptions. There is error. This will be certified.

PER CURIAM. Ordered accordingly.

Cited: State v. *Mooney*, 64 N. C., 56; *State* v. *Phipps*, 76 N. C., 203; *State* v. *Gardner*, 84 N. C., 735; *State* v. *Weaver*, 93 N. C., 600.

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(410)

JANE C. HINTON v. RANSOM HINTON and others.

1. The act of 1784 (R. C., c. 118, s. 1); giving widows of testators six months in which to dissent from wills, is not a statute conferring a right of dower, but a "statute of limitations" upon that right, as it existed at common law.
2. The act of February, 1866, giving widows further time for dissenting, is constitutional, and applies to a case in which at its passage the widow was barred under the act of 1784.
3. All retroactive legislation is not unconstitutional.
4. Retroactive legislation is competent to affect remedies, but not to affect rights.

(*Mitchener v. Atkinson*, 62 N. C., 23; *Morris v. Avery*, *ante*, 238; *Neely v. Craige*, *ante*, 187; *Phillips v. Cameron*, 48 N. C., 390, cited and approved.)

PETITION for dower, heard by *Fowle, J.*, at Fall Term, 1867, of the Superior Court of Wake.

The petition had been filed at May Term, 1866, of the County Court of Wake, and alleged that the husband of the petitioner had died previously to November Term, 1864, leaving a will, which was proved at that term;

and that she had dissented at the term at which the petition was filed, etc., etc.

The answer of the heirs (infants) relied upon the fact that the husband's will had been proved (with previous notice to her), as stated in the petition, for a bar to her power to dissent and claim dower, etc.

Upon the case being carried by appeal into the Superior Court, his Honor dismissed the petition, and the petitioner appealed to the Supreme Court.

Haywood, for the petitioner, cited and commented upon the statutes contained in Rev. Code, chap. 118, sec. 1; Acts of 1861 (September 11), chap. 4, sec. 18; 1863 (February 16), chap. 34, sec. 1; 1866 (February 21), chap. 50, sec. 1; 1866 (February 22), chap. 53, (411) secs. 1, 2, 3; Ordinance of June 23; 1866 (chap. 19, sec. 20), and of June 16 (chap. 26, secs. 1, 2, 3); and upon *Morris* v. *Avery*, *ante*, 238; *Neely* v. *Craig*, *ante*, 187; *Frost* v. *Etheridge*, 12 N. C., 30; *Pettijohn* v. *Beasley*, 18 N. C., 254; *Craven* v. *Craven*, 17 N. C., 338; and *Mitchener* v. *Atkinson*, 62 N.C., 23.

Moore, *contra*.

The Act of 22d February, 1866, under which petitioner claims, divests vested rights; for, under the law which exists at a man's dissolution, death fixes the rights of the survivors; and subsequent legislation affecting those rights, disseizes some one of them "of his freehold, liberties and privileges," or deprives him of his "property." The rights of heirs or devisees just after their ancestor's or testator's death, are conferred by law, and are as if they existed by a special grant from the State. The State, therefore, can not take them away or diminish them in favor of another citizen.

In maintaining these propositions the following authorities were relied upon: 2 Bl. Com., 199 *et seq.*; *Fletcher* v. *Peck*, 2 Curt., 328; *Pawlet* v. *Clarke*, 3 Curt., 358; *Terret* v. *Taylor*, *Ib.*, 259; *Williamson* v. *Leland*, 8 Curt., 228; *University* v. *Foy*, 3 N. C., 310;

Allen v. *Peden*, 4 N. C., 442; *Robeson* v. *Barfield*, 6 N. C., 390; *Hoke* v. *Henderson*, 15 N. C, 1; *Stanmire* v. *Welch*, 48 N. C., 214; *State* v. *Glenn*, 52 N. C., 324; *Smith* v. *Whedbee*, 12 N. C., 160; *Caldwell* v. *Black*, 27 N. C., 463; *Burgwyn* v. *Devereux*, 23 N. C., 583.

PEARSON, C. J. If a legacy be given to A, provided he applies for it in six months after the death of the testator, otherwise it shall go to B, and A does not apply within the time, the title becomes vested in B, and the Legislature has no power to extend the time; for the reason that the testator, by the words of condi- (412) tion and the limitation over to B, makes a compliance with the condition a part of the essence of the gift, and being a condition precedent, it is not saved, even although the condition becomes impossible by the act of God, or by the act of law; and the title of B is absolute.

But we do not think this principle applies to the right of dower, or that that right is created by the Act of 1784, with a condition precedent that when a husband by his will makes a provision for his wife, she shall within six months, after probate of the will, enter her dissent to the provision made for her, and that a compliance with this condition is made a part of the essence of the right of dower. On the contrary, we are entirely satisfied that the right existed at common law, and was not created by the Act of 1784, and that the effect of the act is to prescribe a limitation in respect to the time in which the right shall be claimed, when the husband has by will made a provision for the wife; in other words, it is a "statute of limitations," which in such cases bars the right to a writ of dower, but does not extinguish the pre-existing common law right of dower.

The right of the widow of every freeholder to have dower in all of the lands and tenements, of which her husband was seized at any time during the coverture, of an estate to which she might by possibility have had issue capable of inheriting, not only existed at common law, but it was paramount to all other rights, save those of the crown. Dower attached at the time of the marriage. It was superior to the title of the heir or devisee. It was superior to the claim of creditors, or of purchasers for value. It was superior to the right of the lord claiming by escheat, and by the Statute 6, Edward VI, it is made superior to the right of the Crown by forfeiture, except in the case of high treason. There was no statute of limitations in respect to the right of dower, and after the "statute of uses" it was necessary to pass the (413) "statute of jointures" to prevent widows from keeping their jointures, and also claiming their common law dower.

In the course of time, courts of equity assumed jurisdiction to put widows to their election, when provision was made for them by the will of husbands and a claim to dower would disappoint the other provisions of the will, either to give up the right of dower or to release their right under the will. This doctrine of election is put on the ground that it is against conscience to claim under the will and also against it; but there is no limitation as to time, and the widow is entitled to a reference as to the condition of the estate in order to aid her in making the election. See *Mitchener* v. *Atkinson*, 62 N. C., 23.

It was found in this State that the right of the widow to claim her common law dower, especially after the estate had been settled up, caused great inconvenience, as well to creditors as to devisees and legatees, and for this reason, and also to avoid the expense of resorting to courts of equity, it was provided by the Act of 1784 that a dissent should be entered within six months after probate, or the right of dower should be barred. This statute answered a good purpose, and there was no objection to it in ordinary times, treating it as a "statute of limitations," for, during the six months, the widow had ample opportunity to inform herself as to the condition of the estate of her husband, and, if she found that she was not as well provided for under the will as by the law, or that her husband's estate was likely to be insolvent, she could, without any reproach to his memory, prefer to take by law, as her dower was not subject to debts. But during the extraordinary times which we have had since May, 1861, this statute of limitations, if enforced, would bear with extreme rigor upon widows. There has been an interruption of the courts, and such confusion, generally, that no (414) one could make a safe estimate in regard to the solvency of estates. Moved by considerations of this nature, the Legislature, in 1863, passed an act providing "that, in computations of time for the purpose of any statute limiting any action, or any right or rights, or making any presumption as to payment of bonds, or satisfaction or abandonment of any equity, etc., the time which had elapsed since 20th May, 1861, and which should elapse up to the close of the war, shall not be counted"; and in 1866, after the close of the war, it passed an act providing that in all such cases time should not be counted up to the 1st January, 1867. We are inclined to the opinion, from the general wording of these two acts, and the obvious policy of legislation during the war and the troubled state of things which succeeded it, that the statute limiting the time in which widows were required to enter a dissent, comes within their operation, and that time should not be counted from 20th May, 1861, up to 1st January, 1867, in respect to widows who seek to set up a right of dower at common law. See *Morris* v. *Avery*, *ante*, 238, as to the abatement of suits; *Neely* v. *Craig*, *ante*, 187, as to dormant judgments; by which it is settled that such ordinances and statutes, during the war and since, "confer no new rights, but preserve existing ones." We are, however, relieved from the necessity of declaring an opinion upon that question of construction, for the Legislature, in February, 1866, out of abundance of caution, passed an act by which, in express words, widows are allowed further time to dissent, and which embraces our case; and in June, 1866, the Convention, by an ordinance, gives further time for a widow to dissent, notwithstanding she may have qualified and acted as the executrix of her husband, thus by a plain and necessary implication recognizing and ratifying the Act of February, 1866; for, if a widow, who has qualified and acted as executrix, has a right to enter her dissent and further time is given to her, *a fortiorari*, such (415) further time is given to widows who have not that objection to encounter.

So we take it to be clear that the Act of 1784 was a "statute of limitations," barring the right of dower, and that the Act of February, 1866, expressly embraces our case, and will proceed to the last point: Did the Legislature have power to pass the act putting out of view the effect of the ordinance of June, 1866, to prevent complication.

It is said the Legislature has not the power to interfere with "vested rights," and take property from one and give it to another. That is true; but these devisees took the land subject to the widow's common law right of dower. The act of 1784, consulting public policy, limited the time in which widows should set up claim to dower. The power of the Legislature to do so is unquestionable. The Act of February, 1866, consulting public policy, provides that the time from 20th May, 1861, up to the passage of the act, shall not be counted. Is not the power of the Legislature to do so equally unquestionable? There is in this case no interference with vested rights. The effect of the statute is not to take from the devisee his property and give it to the widow, but merely to take from him a right conferred by the former statute, to bar the widow's writ of dower, by suspending the operation of that statute for a given time; in other words, it affects the remedy and not the right of property. The power of the Legislature to pass retroactive statutes affecting remedies is settled. Suppose a simple contract debt created in 1859. In 1862, the right of action was barred by the general statute of limitations, which did not extinguish the debt, but simply barred the right of action. Then comes the Act of 1863, providing that the time from 20th May, 1861, shall not be counted. Can the debtor object that this deprives him of a vested right Surely not. It only

(416) only takes from him the privilege of claiming the benefit of a former statute, the operation of which is for a season suspended.

So the Act of 1784 does not extinguish the widow's common law right of dower, but simply bars her right of action, unless she enters her dissent within six months and makes claim to her right of dower within that time. Then comes the Act of February, 1866, providing that she shall have further time. Can the devisee object that this deprives him of his land Surely not. It only takes from him the privilege of claiming the benefit of a former statute, whereby to bar the widow's common law right.

In *Phillips* v. *Cameron*, 48 N. C., 390, the power of the Legislature to pass a retrospective statute is assumed, when the intention to give it a retroactive operation is plainly expressed, and that case went off on the ground that there such was not the intention. In our case, the statute immediately bearing on it, although and the statutes referred to, express the intention as plainly as words can do it.

Judgment reversed. This opinion will be certified to the end, etc.

PER CURIAM. Ordered accordingly.

Cited: *Blankenship* v. *McMahon*, 63 N. C., 181; *Johnson* v. *Winslow*, *Id* , 553; *Donoho* v. *Patterson*, 70 N. C., 653; *Benbow* v. *Robbins*, 71 N. C , 339: *Durham* v. *Speeke*, 82 N C., 91; *Railroad* v. *Commissioners*, 82 N. C., 266; *Tabor* v. *Ward*, 83 N. C., 294; *Jones* v. *Arrington*, 91 N. C., 130; *Yorkly* v. *Stinson*, 97 N. C., 240; *Pearsall* v. *Kenan*, 79 N. C., 473; *Whitehurst* v. *Dey*, 90 N. C., 545; *Lowe* v. *Harris*, 112 N. C., 501; *Gillespie* v. *Allison*, 115 N. C., 548; *Dunn* v. *Beaman*, 126 N. C., 770.

(417)

W. L. FORT, Adm'r of Absalom Smith, v. BANK OF CAPE FEAR.

A bank which in 1860 gave to a depositor a certificate setting forth that he had deposited a certain sum "in current notes of the different banks of the State," and that the sum deposited is "payable in like current notes to the depositor, or to his order, on return of the certificate," is liable for the whole amount, with interest from the date of the demand, in currency of the United States.

(*Hamilton v. Eller*, 33, 276, and *Lackey v. Miller*, *ante*, 26, distinguished and approved.)

ASSUMPSIT (with two counts, one special, the other *indebitatus*), tried upon a case agreed before *Barnes*, *J.*, at December Special Term, 1867, of the Superior Court of Wake.

On the 26th of May, 1860, the plaintiff deposited with the defendant, at its branch in Raleigh, the sum of $480 in current notes of different banks of the State, and received from the cashier the following certificate:

"BANK OF CAPE FEAR,
Branch at Raleigh, N. C., 26th May, 1860.
"$480.

W. L. Fort, Esq., administrator, has deposited in this bank the sum of four hundred and eighty dollars in current notes of the different banks of the State of North Carolina, which sum is payable in like current notes to said depositor, or to his order, on return of this certificate. (Signed) W. H. JONES, Cashier."

On the 23d day of February, 1867, the plaintiff presented the certificate at the office of the branch bank at Raleigh and demanded payment in the currency of the United States, or in bank notes of the different banks of the State current at the date of presentation. The defendant refused to make such payment, but (418) offered to pay in its own bank notes, or in the notes of the different banks of the State, current at the time of deposit. The plaintiff declined to accept such notes, and brought this suit.

It was admitted that the notes of the different banks of the State, including the defendant, current at the date of deposit, were not current at par at the time of demand, and have not since been so current; also, that at the date of demand and since, the notes of the Bank of Cape Fear were worth twenty-six cents in the dollar in the currency of the United States, and that the average value of the different bank notes of the State current in 1860, is eighteen cents. It was further agreed that his Honor should render judgment for such sum as he should be of opinion the plaintiff was entitled to recover. The court gave judgment for $124.80, with interest from February 23, 1867, and the plaintiff appealed.

Haywood, for the appellant.

The true construction of the contract is, to pay $480 in currency of the United States, to be discharged by payment of such a sum in bank notes as will equal $480 in United States currency. *Lackey* v. *Miller*, *ante*, 26; *Hamilton* v. *Eller*, 33 N. C., 276.

The measure of damages for breach of contract to pay "like current bank notes," is $480, and interest.

A promise by the bank, in writing not evidencing a special deposit, to pay in current bank notes of other banks, etc., is *ultra vires* and void. Rev. Stat., 2, pages 37 to 56; Act of 1854 (Priv.), chap. 77, page 25; Rev. Code, chap. 36, sec. 2; Ang. and Am., secs. 110 to 112; *Ibid*, sec. 256.

Though the written contract be void, the plaintiff can recover upon the *indebitatus* count for money had, etc. Ang. and Am., sec. 265, and cases cited; n. 4.

(419) Such a count may be maintained for bank notes. *Filgo* v. *Penny*, 6 N. C., 182; *Anderson* v. *Hawkins*, 10 N. C., 560; *Jones* v. *Cook*, 14 N. C., 112; *Hargrave* v. *Dusenbery*, 9 N. C., 326.

Rogers & Batchelor, *contra*.

PEARSON, C. J. We do not concur with his Honor in regard to the construction of the instrument sued on.

The plaintiff deposited in bank as a general deposit the sum of $480. Without more saying, this would have entitled him to demand of the bank that amount in specie; and, for the purpose of qualifying his demand, it is set out that the funds deposited, amounting to $480, consisted of current notes of the different banks of the State of North Carolina, which were then at or about par, but for which the bank was not willing to oblige itself to pay specie, and it is accordingly stipulated—"which sum is payable in like current notes." When the certificate was presented, none of the notes of the banks of the State were current. They had all so far depreciated as no longer to circulate as currency, and instead thereof had become articles of merchandise, without retaining in any degree the character of current money. Owing to this change in the condition of things, the bank was unable to perform its stipulation, to pay the sum of $480 in like current notes; and the question is, on whom shall the loss fall? Obviously it must fall on the bank, for it has had the use of the plaintiff's money, and is unable to return funds of the same kind; and, surely, the plaintiff has a right to expect funds as good as what he deposited. There is nothing to support the inference that, according to the understanding, he took upon himself the risk of loss, in case of utter depreciation of the notes of all of the banks, including those of the Bank of Cape Fear, which seems to (420) have been the idea of his Honor in rendering judgment for the value of the notes of that bank.

We think that the plaintiff was liberal in offering to accept currency of the United States in satisfaction of his certificate of deposit.

The cases of *Hamilton* v. *Eller*, 33 N. C., 276; *Lackey* v. *Miller*, *ante*, 26, are distinguishable from our case. In each of these cases a literal construction is adhered to, which seems to meet the question of the respective cases, and the intention of the parties. Eller owed Hamilton the sum of $150, which Hamilton agreed to receive "in good trade, to be valued," etc., provided it was delivered on or before the 1st day of January, 1844. Eller failed to deliver the trade, and was obliged to pay the $15. Miller, in 1865, bought a cow of Lackey, worth $20 in good money, and gave his note for "$71 in current bank notes." It was held that did not create a debt of $71 in money, or United States coin, but was a promise to pay "seventy one current bank money dollars," and a distinction is taken between a promise to pay in bank notes, and a promise to pay in money, and a promise to pay in "currency," which was even still more depreciated.

In our case, the plaintiff deposits with the bank $480, and, as he made the deposit in current bank notes, then at about par, he agreed to receive "like current bank notes," which the defendant is not in a condition to pay, and our decision is that payment must be made so as to put the loss on the bank, and not on the depositor.

PER CURIAM. Judgment reversed, and judgment on the case agreed for $480, with interest.

(421)

W. C. BENBOW v. NORTH CAROLINA RAILROAD COMPANY.

1. It is the duty of a railroad company to deliver articles at the usual places of delivery. Therefore, where a hogshead of molasses, instead of being landed on a platform, the usual place for heavy articles, was lost in an attempt to deliver it to the plaintiff at an unusual and an unfit place, the company was held responsible.
2. Whether a railroad company is compellable to furnish hands to remove heavy articles from the platform to wagons sent to haul them away; and if so, whether for any loss occurring in such removal the company is liable as a common carrier or only as a bailee for hire—*Quaere?*

CASE, tried before *Warren, J.*, at Spring Term, 1867, of the Superior Court of Guilford, upon the following facts agreed:

The defendant transported to Greensboro, for the plaintiff, a hogshead of molasses. The car in which it was conveyed passed beyond the old warehouse to the new platform in order to come in on the side-track, and owing to the location of other cars, was stopped at the west side of the new platform and was not brought back to the old warehouse. The plaintiff was informed by the defendant's agent that the molasses was at the depot and was requested to send for it. He therefore sent his driver with a wagon for it Upon application by the driver for the molasses, the agent told him to drive around, that it was at the west end of the new platform, and the agent went with hands in the employment of the company to deliver it. The hogshead was then rolled out of the car upon the new platform, and thence the hands of the defendant and the plaintiff's driver attempted to remove it into the wagon (which had been backed up to the platform) by means of a plank which passed, at an angle of 45 degrees, from the wagon to the platform. In the attempt, the hogshead rolled, fell upon the ground and burst. It was agreed that if his Honor should be of opinion that the plaintiff was entitled to recover, a judgment (422) should be entered for the value of the molasses; otherwise, a judgment of nonsuit. The Court, being of opinion with defendant, gave judgment accordingly, and the plaintiff appealed.

Scott & Scott, for the appellant.

Defendant ought to have delivered the hogshead at the old warehouse, the usual place. *Hilliard* v. *Railroad Co.*, 51 N. C., 343; *Neal* v. *same*, 53 N. C., 482; 1 Pars Con., 663, n. v.; *Thomas* v. *Boston and Prov. Railroad Co.*, 10 Met., 472.

Delivery was not complete when accident occurred, and under circumstances defendant must be held to have warranted the sufficiency of the method suggested by himself, as the plaintiff had nothing to do with it. *DeMott* v. *Laraway*, 14 Wend., 225; *Graff* v. *Bloomer*, 9

Barr, 114; 1 Pars. Con., 658, n. o. If plaintiff had requested the delivery at an unusual place, defendant would not have been liable. *Lewis* v. *West. Railroad Co.*, 11 Met., 509. See *Richards* v. *London Railway*, 7 C. B., 839, as to responsibility of a company for acts of porters in its employ.

Moore, contra.

When the hogshead was safely landed upon the platform, that was a delivery; and the company was liable no longer as a common carrier. That the plaintiff waived a deposit in the warehouse can make no difference. That hands employed by the company volunteered to assist the plaintiff, who was short of hands, to transfer the hogshead from the platform into the wagon, can not involve the company in any responsibility; at least, can involve it no further than, as an unpaid bailee, for gross neglect. *Hilliard* v. *Railroad*, 51 N. C., 343; *Neal* v. *Railroad*, 53 N. C., 482; *Boner* v. *Steamboat Co.*, 46 N. C., 211; *Stanton* v. *Bell*, 9 N. C., 145.
(423) Here the facts do not show negligence, and the burden of proof is upon the plaintiff. 2 Star. Ev., 970.

PEARSON, C. J. The car which brought the hogshead of molasses passed beyond the old warehouse to come in on the side-track, and was, owing to the location of other cars, stopped at the western end of the new platform, and was not brought back to the old warehouse. "Plaintiff's driver applied for the molasses, and the agent told him to drive around, that it was at the west end of the new platform." In the attempt to remove the molasses from the car to the wagon, using the west end of the new platform as a resting place, the molasses was lost.

It is clear, from the statement of the case, that the defendant's agent intended to land the molasses on the platform at the old warehouse, and failed to do so because some other cars were on the side-track; and it is to be inferred that the driver of the plaintiff applied for it at the old warehouse, and was told "to drive around." So we must take it that the platform at the old warehouse was the usual place at which heavy articles were landed, and the attempt to remove the molasses from the car to the wagon at the west end of the new platform (a place, by the by, which was very ill-suited for the purpose), at an angle of 45 degrees, was resorted to by the agent of the defendant in order to get around the difficulty caused by other cars being in the way.

We hold, upon this state of facts, that the defendant is liable for the loss, on the ground that the molasses was not delivered according to its contract as a common carrier.

If the molasses had been landed on the platform at the old warehouse, the usual place of landing such articles, we incline to the opinion that the transit of the article would have been at an end, so as to relieve the defendant from further liability as a common carrier.

Whether railroad companies are compellable to (424) furnish hands to remove heavy articles from the platform to wagons sent to haul them away, is a question into which we do not enter, except to remark that such a practice would greatly promote the convenience of persons who employ the road and add much to its business.

We also refrain from expressing an opinion how far, if there be such a practice, the railroad companies would be liable for loss as common carriers, or merely as bailees for hire (we put out of the question the motion of a gratuitous bailment) because it is not set out in the case, whether there is such a practice at the Greensboro station or not, and it may be that the attempt in this case to load the wagon is attributable to a desire to get the molasses into the wagon at an unusual and very unfit place, because of the difficulty of getting the car up to the right place. So this instance does not furnish any ground sufficient to infer a practice.

As is said in *Hilliard* v. *Railroad*, 51 N. C., 343: "We prefer feeling our way until the necessity of the decision in some case may require a direct determination."

PER CURIAM. Judgment reversed, and judgment here for plaintiff.

(425)

THE STATE v. JOHN OWEN.

1. A special venire having been summoned for the trial of a prisoner upon a day previous to the day of trial: *Held*, that a successful challenge by the prisoner to the array of the original panel did not necessarily affect the competency of the special venire to act as jurors in the case.
2. Where one who had been insulted ran a short distance to his house to procure a gun, and then pursued the deceased (who had ridden off), in order to exact an apology, or failing in that, to do him great bodily harm, or kill him: *Held*, that, if upon his approach, the deceased turned upon him, putting his hand to his side as if to draw a weapon, and was thereupon killed by a blow of the gun, the prisoner was guilty of murder.

(*State v. Benton*, 19 N. C., 196; *State v. Lytle*, 27 N. C., 58; *State v. Shaw*, 25 N. C., 532; *State v. Madison Johnson*, 23 N. C., 354; *State v. Jacob Johnson*, 47 N. C., 247, cited and approved.)

MURDER, tried at Fall Term, 1867, of the Superior Court of Gaston, before *Gilliam, J.*

Upon the trial the prisoner challenged the array of the original panel, on the ground that the jury lists had not been made out in accordance with the statutes of the State, or with the order of General Sickles. The cause was admitted by the Solicitor, and, by consent, the array was quashed. A special venire had been ordered on a previous day, and as the names upon it were being called, the prisoner challenged that array on the ground that, as the original panel had been set aside, the special venire could not be resorted to. This challenge was overruled, and a jury was drawn from this panel. To this the prisoner excepted.

After the State had made out its case, the defendant introduced Dr. Sloan, and proceeded to give in evidence (no objection being made) a conversation about the homicide between himself and the witness a few days after it occurred. In the course of that conversation the prisoner, after giving an account of his having (426) gone to Beatty's Ford with the deceased in his buggy in the former part of the day, of his returning in the same way with him, and their eating dinner together at the prisoner's house, of some quarrel on politics in the house and an indulgence by the deceased in drinking, of his being helped by the prisoner into his buggy and starting towards home—went on to say that he accompanied the deceased to the gate, and when the latter had gotten outside, some conversation ensued, in the course of which the deceased told one Caldwell, who was present, "Owen is the damnedest rascal I ever saw," and after something more, "that he might help himself." Prisoner replying, "if you will give me a few minutes, I will help myself," went to the house, and getting a gun, returned, and finding the deceased had gone, pursued him. When he overtook him the deceased got out of his buggy and came to meet him. He added that he knew deceased was armed and always went so, and seeing him put his hand to his side as if to draw a pistol, he struck downward with his gun and deceased fell like a beef.

Upon this the court was asked to charge the jury that if they believed the above to be a true account of the homicide, and that the prisoner killed the deceased to save his own life, he was guilty of manslaughter only.

The court declined to give that instruction, and told the jury that if the prisoner armed himself with a gun and followed the deceased in order to demand satisfaction for the insult which he had received, or failing in that, to kill the deceased or do him some great bodily harm, the killing, even as he had described it to Dr. Sloan, would be murder.

Verdict, Guilty. Rule for new trial discharged. Judgment, and appeal.

Vance and *Bragg*, for the prisoner.
Attorney-General, *contra.*

(427) BATTLE, J. We have examined with care the errors assigned in the bill of exceptions, both for a *venire de novo* and for a new trial, without being able to find anything to sustain either of them.

The objection to the formation of the jury, upon which the motion for a *venire de novo* was founded, is clearly untenable. The challenge to the array of the original panel of jurors by the prisoner, and the admission by the Solicitor for the State of the cause of challenge, made it absolutely necessary to resort to the special *venire*, just as it would have been had the prisoner challenged each juror separately. In the latter case the jurors summoned on the special *venire* would have properly been called in, and we can not perceive any good reason why the same course was not admissible when the whole original panel was set aside at the instance of the prisoner. *State* v. *Benton*, 19 N. C., 196; *State* v. *Lytle*, 27 N. C., 58; *State* v. *Shaw*, 25 N. C., 532.

The objection to the charge of the Judge, upon which the motion for a new trial was based, is also untenable. The instruction which the prisoner's counsel requested to be given the jury upon the testimony of his witness, Dr. Sloan, was, that if they believed the circumstances of the homicide were correctly stated by the prisoner in his interview with the witness Sloan, and that the prisoner killed the deceased to save his own life, he could not be convicted of murder, but of manslaughter only. The Judge declined to give the instructions in the terms asked, and we think he did so properly, because it left out of view the material and important fact, that the testimony of the witness tended to prove that the prisoner had followed the deceased with a deadly weapon for the purpose of demanding satisfaction for the insult given him, and to kill deceased, or to do him great bodily harm, should the demand for satisfaction be refused. The Judge, therefore, was right to adapt

(428) his charge to the facts proved, and, according to them, the prisoner was undoubtedly guilty of murder. See *State* v. *Madison Johnson*, 23 N. C., 354, as explained and corroborated in *State* v. *Jacob Johnson*, 47 N. C., 247.

It must be certified to the Superior Court of law for the county of Gaston that there is no error in the record.

PER CURIAM. There is no error.

Cited: *State* v. *Taylor*, *post*, 512; *State* v. *McCurry*, 63 N. C., 34.

THOMAS S. DEAVER v. JAMES A. KEITH.

A court has no power to grant a judicial attachment after a return of "not found" made upon a writ issued against a non-resident; and where under these circumstances such a writ had been taken out: *Held*, that it was the duty of the Court to dismiss it on motion made by or for the defendant, or even *ex mero motu*.

(*Webb v. Bowler*, 50 N. C., 362, and *Israel v. Ivey*, 551 *post*, cited and approved.)

JUDICIAL ATTACHMENT (upon a motion to dismiss) before *Buxton, J.*, at Fall Term, 1867, of the Superior Court of Madison.

The plaintiff issued a writ in trespass against the defendant, returnable to August Term, 1866, of the County Court of Madison. The defendant was a non-resident of the State and the writ was returned "not found." Upon motion, at that term, a judicial attachment against the property of the defendant was granted the plaintiff, no affidavit or bond being required of him, and the attachment was duly levied. Upon the return of the proceeding, the defendant's counsel, without filing a replevy bond, moved to dismiss. The motion was refused, and the defendant appealed to the Superior Court. In that court, the motion was re- (429)

newed before his Honor Judge Buxton, and being refused, the defendant again appealed.

Phillips & Battle, for the appellant.
Merrimon, contra.

BATTLE, J. We are clearly of opinion that his Honor, in the court below, erred in refusing to dismiss the attachment. The reason given by him for refusal to dismiss shows that he was misled by considering the case as coming within the provision of the fifty-second section of the thirty-first chapter of the Revised Code alone, without reference to the fourteenth section of the attachment law contained in the seventh chapter of The Code.

The whole Revised Code was enacted as one statute consisting of various chapters, some of which have intimate connections with others, and must be construed with reference to them. Hence the section of the chapter first above mentioned, which authorizes the issuing of a judicial attachment in certain cases, must be taken to mean such cases only as are not absolutely prohibited by the fourteenth section of the attachment law. The object of the last-named section was the protection of non-residents from proceedings against their property without the security of an affidavit made and bond given by the plaintiff in the attachment, whenever the leading process in the suit has not been executed on the person of the defendant when within the State. It is manifest that without this provision every person having, or pretending to have, a claim against a non-resident, might evade the making an affidavit and giving a bond, as required in an original attachment, by first issuing original process against the defendant, and then, upon the return of *non est inventus*, electing to (430) issue a judicial attachment, instead of issuing *an alias* or *pluries capias* under the fifty-second section of the thirty-first chapter of the Revised Code, above referred to.

The proceeding in this case purports not to be instituted, under the sixteenth section of the seventh chapter of The Code, for an injury to the proper person or property of the plaintiff; but, if it were, it can not be sustained, because it does not appear that the defendant had absconded or concealed himself within three months after the commission of the wrong.

The only inquiry which remains to be considered is, whether the defendant had a right to move to dismiss the proceedings without having replevied the property attached. The judicial attachment having been issued without any legal authority, the defendant was not in anyway within the jurisdiction of the court, and it had not, therefore, any authority to proceed; and nothing was left for it to do but to dismiss the proceeding, and this it ought to have done at the instance of the defendant, or of any other person, or *ex mero motu*. See *Webb* v. *Bowler*, 50 N. C., 362; *Israel* v. *Ivey* (*post*, 551), and the cases there referred to.

The judgment must be reversed, and it must be certified to the court below that this court is of opinion that the attachment was not a proper process to be sued out by the plaintiff in this case, and that the writ ought to be quashed.

Per Curiam. Judgment reversed.

Cited: *Cameron* v. *Marcellus*, 48 N. C., 83.

WILLIAM B. CARTER v. HENRY McGEHEE, Administrator of Nathaniel Scales.

A creditor having, in March, 1863, refused to accept Confederate or State notes in payment of debts contracted before the late war, the debtor brought to him a bond upon a third party for the amount due, payable to the creditor, who agreed to take it in discharge of the debt, provided the debtor would sign it as surety. He did so and the former evidences of indebtedness were cancelled: *Held*, that the debtor became a *guarantor* of the bond and was liable in assumpsit for the full amount, without reference to the laws providing for a scale of debts contracted during the war.

(*Carpenter v. Wall*, 20 N. C., 144, and *Green v. Thornton*, 49 N. C., 230, cited and approved.)

ASSUMPSIT, tried before *Mitchell, J.*, at Fall Term, 1867, of the Superior Court of Rockingham, upon the following case agreed:

The defendant's intestate, in the years 1856 and 1857, became indebted to the plaintiff for borrowed money and executed bonds therefor at the dates of the loans. The principal and interest amounted on the 14th of March, 1863, to $3,000. On that day Scales offered to pay off his bonds in Confederate notes or State money, and the plaintiff refused to accept them. Thereupon Scales procured the bond of the county of Rockingham for $3,000, payable to the plaintiff, but upon what consideration the plaintiff was ignorant. Scales tendered it to the plaintiff in payment of his bonds, and he refused to accept it unless Scales would become surety for the county. Scales signed as surety at the foot of the bond, and thereupon the bonds given for the borrowed money were surrendered.

The plaintiff contended that the defendant was liable for $3,000, with interest from March 14, 1863. The defendant insisted that he was entitled to the benefit of the scale of depreciation under the Act of Assembly of 1866, chap. 39. (432) It was agreed that if the court should be of opinion with the defendant, judgment should be entered for $750 and interest; but if with the plaintiff, for $3,000 and interest.

Upon the case agreed, his Honor gave judgment for

$3,000, with interest from March 14, 1863, and the defendant appealed.

Merrimon, for the appellant.
Phillips & Battle, *contra*.

BATTLE, J. The judgment rendered by his Honor in the court below upon the case agreed is undoubtedly correct. The argument of the defendant's counsel to the contrary is based upon the fallacious idea that the intestate of the defendant was bound as the surety of the county of Rockingham, in the ordinary sense in which the word surety is used in connection with a principal. But in legal effect he was not a surety, but a guarantor. A guaranty is defined to be "a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person, who is himself liable in the first instance to such payment or performance." *Carpenter* v. *Wall*, 20 N. C., 144; Fell on Guar.; 1 Smith Mer. Law, 277. The present case comes directly within that definition. The county of Rockingham became bound to pay the plaintiff, as soon as its bond was delivered to him, the sum of $3,000, and the defendant's intestate promised, in consideration of the transaction between him and the plaintiff, to pay the debt in case of the failure of the obligor to do so.

The transaction between the parties to the guaranty required a consideration for its support. Here there was a consideration, which was the discharge of debts due from the intestate to the plaintiff, which were admitted to have been of the value in specie of $3,000. To (433) such a claim it is manifest from its express words that the Act of 1866, chap. 38, entitled "An act relating to debts contracted during the late war," did not intend to apply the scale of depreciation provided for in chapter 39 of the Laws passed at the same session.

In opposition to this view of the case, it was urged by the defendant's counsel that the intestate signed the county bond professedly as surety, and not as guarantor, and that, therefore, he can not be bound as guarantor. The case of *Green* v. *Thornton*, 49 N. C., 230, is directly in point against this objection. In that case the defendant, whose name was signed to an instrument purporting to be an indenture between the plaintiff and another person was held to be a guarantor though the word "security" was added to his name. It is true that the plaintiff failed to recover against him, because he could not prove any consideration for the contract of guaranty; but, in the present case, an ample consideration was proved, and the plaintiff is not prohibited by the Act of 1866, above referred to, from recovering to the extent of it.

The judgment is affirmed.

PER CURIAM. Judgment affirmed.

Cited: *James* v. *Long*, 68 N. C., 219; *Bryan* v. *Harrison*, 71 N. C., 480.

(434)

THE STATE v. ISAAC MOONEY.

A mere threat unaccompanied by an offer or attempt to strike, is not an assault.

ASSAULT, tried before *Little, J.*, at Fall Term, 1867, of the Superior Court of Wilkes.

The prosecutor, with some other persons, had gone to Mooney's house, and, after some conversation, a quarrel arose, in the course of which insulting language was used by both parties. Thereupon the defendant ordered the others to leave his house. At or about the same time he seized his gun; the witnesses differing as to whether he did this immediately, or after finding that the prosecutor and his party did not leave. A scuffle for the gun ensued between the defendant and some members of his own family, and the latter finally got possession of it. The defendant did not present it or attempt to make use of it. As the prosecutor and his friends were leaving the premises the defendant followed them and seized an axe, getting near enough to throw it, but the witnesses differed as to whether he was near enough to strike with it. He did not attempt to use it. Subsequently, upon being dared to come out, he advanced again with the axe, but did not get nearer to them than twenty-five or thirty yards.

The court charged the jury that, in any view of the testimony, an assault had been committed by the defendant with both the gun and the axe.

Verdict, Guilty. Rule for a new trial discharged. Judgment, and appeal.

No counsel for the appellant.
Attorney-General, contra.

(435) READE, J. His Honor's charge "that in any view of the case, the defendant was guilty," is so broad as to entitle the defendant to a new trial, if there is any view consistent with his innocence.

After a careful consideration of the testimony, we are obliged to say that, in no view of the case, is the defendant guilty.

When the defendant ordered the prosecutor and his crowd to leave his house, as he had a right to do, it may have been rude behavior to seize his gun at the same time; but as he did not point his gun, or in any way offer or attempt to use it, there was certainly no assault, which is an offer or attempt, and not a mere threat, to commit violence. And so the picking up of the axe within some twenty-five yards of the prosecutor, without an offer or attempt to use it, was not an assault. There is error. This opinion will be certified.

PER CURIAM. New trial.

Cited: State v. *Church*, 63 N. C., 16; *State* v. *Milsaps*, 82 N. C., 551.

JOHN DEN v. JAMES R. LOVE.

The Ordinance of the 23d June, 1866, which changed the jurisdiction of the courts, prevented an action from abating before or at Fall Term, 1866, by the death of a defendant in 1864, after the Fall Term of that year.

(*Morris v. Avery*, *ante*, 238, cited and approved.)

TRESPASS, Q. C. F , before *Mitchell, J.*, at Fall Term, 1866, of the Superior Court of McDowell.

A motion having been made for notices to issue to the executors of the defendant, upon a suggestion (436) that he was dead; on its appearing to the court that he had died in the fall of 1864, after the Fall Term of the court, the motion was refused, and the suit adjudged to have abated.

From this judgment the plaintiff appealed.

No counsel for the appllant.

Merrimon, *contra.*

READE, J. Before the Ordinance to change the jurisdiction of the courts, etc. (23d June, 1866), this suit would have abated by reason that two terms had elapsed after the defendant's death without making his executor a party. But that ordinance provides that the time elapsed since 1st September, 1861, barring actions and suits, or presuming the satisfaction or abandonment of rights, shall not be counted. That ordinance prevented this suit from abating. We so held in *Morris* v. *Avery*, *ante*, 238 His Honor's ruling in this case was before that decision.

There is error. Let this be certified, etc.

PER CURIAM. There is error.

(437)

THE STATE v. THOMAS DULA.

1. Where there is any evidence of an agreement between two or more to compass the death of a third person, the decision of the court below that such evidence is sufficient to establish the agreement (preliminary to the admission of the acts, etc., of one of such persons as evidence against the other), can not be reviewed in the Supreme Court.
2. Although in investigating the preliminary question as to the agreement, evidence of the naked declarations of one of the parties is not competent; yet if such declarations make part of the act charged in the indictment, it is otherwise.
3. In order to support an exception to the exclusion of certain testimony, such testimony must appear to have been relevant.
4. What one says *in via*, as to the place to which he is going, is competent evidence to establish the truth of what he says.
5. It is no ground for an arrest of judgment that the name of the State is omitted in the body of the indictment; or that the memorandum of the pleas of two defendants is prefaced by the word "saith."

(*State v. Dula, ante*, 211, and *State v. Lane*, 26 N. C., 113, cited and approved.)

MURDER, tried at a Court of Oyer and Terminer for Iredell, upon the third Monday of January, 1868, before *Shipp, J.*

The prisoner was charged as principal in the murder of one Laura Foster, in Wilkes County, in January, 1866; one Ann Melton being charged in the same indictment as accessory before the fact, but not being upon trial, in consequence of an affidavit made by the prisoner.

The State relied upon circumstantial testimony, and upon the acts and declarations of Ann Melton in furtherance of an alleged agreement between her and the prisoner to commit the homicide. To establish the agreement evidence was given to the court that the deceased was at home, at her father's, on Thursday night, the 24th of January, but on the next morning was gone, as was also a mare that had been tied in the yard. Early on Friday she was seen upon the mare, about a mile from home, going in the direction of "the Bates (438) place." She was not seen alive after that, but subsequently her body was found rudely buried

in a laurel thicket near that place, and there was a wound upon her left side piercing the cavity of the body. There was evidence that the prisoner was in the habit of criminal intercourse with both the deceased and Ann Melton; that some short while before he had contracted a disease from the deceased and had communicated it to Ann Melton; that he had threatened to "put through" whoever had given it to him; that he had been with the deceased at her home on the Sunday and Monday before she disappeared, and there had private conversations with her; that on Thursday and Friday he had had private interviews with Ann Melton at her home, and on a ridge near her home; that he had sent for liquor in a canteen when at her house on Thursday, which was brought there in his absence; whereupon, Ann Melton had sent for him by a little girl, in a secret and singular manner, to come and get it, but her messenger did not find him; that afterwards he had come to her mother's house, and after a private conversation between them, he and Ann went off in opposite directions; that during the same day he had been at Ann Melton's house, saying he had met her upon a ridge near by, and that she had told him where to get the canteen and some alum; that he had borrowed a mattock during the day from her mother and was seen with it near "the Bates place"; that on Friday morning he was seen travelling in the direction of "the Bates place," by a road which ran parallel with that by which Laura Foster was seen going; that Ann Melton, after leaving her mother's, did not return to her own house until Friday morning, when her shoes and dress were wet, and she retired to bed, remaining there most of the day; after she had gone to bed the
(439) prisoner came there, leaned over her, and had a whispered conversation with her.

The hypothesis of the State was that the grave was dug on Thursday or Thursday night, and the deceased killed on Friday or Friday night; and that the motive was the communication of the disease.

On motion by the State, the court held that the above circumstances were sufficient to authorize the introduction of Ann Melton's acts and declarations in furtherance of the common design; cautioning the jury at the same time that this decision was to have no weight with them as to the prisoner's guilt or innocence.

To this decision the prisoner excepted; as he did specially to the court's hearing evidence, whilst taking information upon that point, as to the message sent by the little girl.

Evidence was admitted that Laura Foster had said to a witness, whilst riding in the direction of the Bates' place, that she was going to that place. To this the prisoner had excepted, and at a subsequent stage of the trial the State agreed that it should not be considered as in evidence; and the court thereupon, in charging the jury, told them not to regard it. The prisoner complained of the admission as calculated to prejudice him before the jury.

One Eliza Anderson (a white woman), a witness for the State, was asked, upon cross-examination, if she was related to John Anderson (a man of color), and the object of this question was stated to be her disparagement or discredit. Upon objection, the question was ruled out.

Verdict, Guilty. Rule for a new trial discharged. Judgment, and appeal.

Vance, for the prisoner.

Attorney-General, *Boyden* and *Clement*, *contra*.

(440) PEARSON, C. J. The case, as it now comes up, presents but few points, and no one of them calls for much discussion.

1st. On the argument, the point made upon the evidence offered to the court as preliminary to the admissiblity of the acts and declarations of Ann Melton in evidence to the jury against the prisoner, was treated as if the question before this court was in regard to the sufficiency of the evidence to establish the fact of an agreement between Ann Melton and the prisoner to compass the death of Laura Foster; whereas, this court is confined to the question—was there any evidence tending to establish the fact? If so, his Honor's decision, as to its sufficiency, was upon a question of fact, which we can not review. Looking at it in this point of view, it must be conceded that the point is against the prisoner.

2d. "His Honor erred in receiving as evidence to himself the declaration of Ann Melton, to-wit, the message and instructions given by her to the little girl sent by her to the prisoner." It does not appear on the record that this evidence was objected to as inadmissible. But, suppose it was objected to, we are of opinion that it was admissible on the ground that, although naked declarations of one are not admissible against the other, to show an agency or an agreement, yet this was not a naked declaration, like an admission or confession, but was a part of the act and, indeed, the most important part of it.

3d. "The words used by Laura Foster ought not to have been received as evidence." We think that the evidence was admissible as a part of the act. It was so considered by us when the case was up before. *Vide, ante*, 211.

4th. "The question put to the witness, Eliza Anderson, ought not to have been ruled out." There is not enough set out in the statement of the case to
(441) show the relevancy of this question, and we are confined to what appears in the statement of the case, treating it as a bill of exceptions on the part of the prisoner.

Neither of the two grounds, taken in support of the motion to arrest the judgment, are tenable. *State* v. *Lane*, 26 N. C., 113, is a conclusive answer to one, and the other is only objectionable as violating a rule of grammar. This does not vitiate a legal proceeding when the sense and meaning is clear. Indeed, as the plea of "not guilty" is several and not joint, it would seem to be most proper to use the verb in the singular number and to set out in the record that each person upon the arraignment saith "he is not guilty," "she is not guilty," instead of putting it in the form of a joint plea; but the authorities support the entry in either way.

There is no error. This opinion will be certified to the end, etc.

PER CURIAM. There is no error.

Cited: State v. *McNair*, 93 N. C., 630; *State* v. *Arnold*, 107 N. C., 864.

THE STATE v. WASHINGTON HICKS.

In the course of selecting a jury for the trial of a capital crime, two persons, who had been called and challenged by the prisoner for cause and confessed such cause, in reply to further questions upon the same point by the Court, made disrespectful answers: *Held*, to have been proper for the Court to rebuke such persons pointedly, and that no rights of the prisoner were infringed thereby.

HIGHWAY ROBBERY, tried before *Green, J.*, at a term of the Criminal Court for Craven, held on the fourth Monday of September, 1867.

(442) The only objection made by the prisoner to the propriety of the trial below was founded upon incidents which occurred whilst the jury was being made up. Two persons, who had been called upon the jury and challenged for cause, admitted severally that from report they had formed and expressed an opinion that the prisoner was guilty. Each of them was then asked whether the impression so made was so strong as to prevent him from giving the prisoner a fair trial. The former answered that the impression made upon him was so great that he would find the prisoner guilty although the evidence on the trial showed that he was not guilty. Upon this the court rejected him and observed that he was not fit to sit on that or any other jury. The latter answered that he would find the prisoner guilty if the court should instruct him that accord-

ing to the evidence he was not guilty. Thereupon the court rejected him, and said that if he did he would be guilty of perjury.

The prisoner excepted to these remarks by the court as calculated to intimidate other members of the panel from candidly expressing their opinions as to his guilt, and thus, to force him to exhaust his peremptory challenges on persons who ought to have been rejected for cause.

The court overruled the exceptions, and a verdict of guilty having been found, judgment of death was pronounced. Thereupon the prisoner appealed.

No counsel for the prisoner.
Attorney-General, contra.

READE, J. The powers and duties of this court and of the Judges of the Superior Court seem to have been misconstrued in the exceptions which bring this case before us. "Men of ability, integrity and learned in the law" are commissioned to hold the Superior Courts, and for "willfully violating any article of the Constitution, maladministration or corruption," they (443) may be impeached by the Legislature and indicted in the courts. And the office of this court is to "hear and determine all questions of law" and "all cases in equity" brought before it from the Superior Courts. It is not within the province of this court to supervise the mere behavior of the Judge below, or his manner of holding his court, or to criticise his remarks to the bystanders, or to prescribe what morals he shall inculcate. Mere proprieties are entrusted to him only. They are not matters of science, and are not prescribed by any authority. It is only where the party's legal rights have been prejudiced in the court below that this court can interfere. For illustration, it may be said that the prisoner had the legal right to have both of the jurors, who were challenged, rejected; and, if his Honor had refused to reject them, it would have been an error which we could correct; but, the manner of rejecting them, or the temper, or propriety of any remarks in regard to the persons rejected, can not be reviewed by us. And this is decisive of the case, as it is stated that there was no exception to his Honor's charge.

If we were to say no more, it might be supposed, to the prejudice of his Honor, that we had sustained, only because we had not the power to overrule him. Such is not the fact. The privileges, not to say the duties, of the learned and good men who administer the law among the people, go very far beyond the mere formal declaration of what the law is. They must show its justice, and make it popular. They must not only punish crime, but denounce and make it odious. They must not only rebuke vice, but praise virtue. They must be ensamples as well of good men as of great judges. These qualities of our judges, and these influences in our courts, have made them palladiums, in which the people trust more than in armies.

When the two men, who were rejected as jurors, vaunted their depravity, it would have been a shame if his Honor had not rebuked it. And, but for some good reason which does not appear to us, it would have been proper to punish it severely, if any punishment could be more severe than the scorn which must pursue the depravity that would take life against the law and the evidence.

That there might have been others of the jurors of like temper towards the prisoner, who were deterred from expressing it by reason of the rebuke of those two rejected jurors, is a remote possibility. The legitimate effect of his Honor's remarks was to impress upon all who heard them that the prisoner was entitled to a fair and impartial trial, according to the law and evidence; and that it would be perjury in any juror to deny him such a trial. After the jury was impannelled, like remarks by the Judge in his charge to them could not have been complained of by the prisoner. Much less could he complain when the remarks were made to all, before they were impannelled, thereby not only rightly disposing of the jury, but tempering the outside pressure, which is felt like the wind. It is a pleasure to know that our courts yield nothing to the prejudice of classes;

and, that they take the most care where there is the greatest danger, and are most humane where there is the greatest dependence.

The prisoner has been deprived of no right to which he was entitled, and therefore the verdict must stand.

There is no error. This will be certified to the court below, to the end that such proceedings may be had as the law directs.

PER CURIAM. Ordered accordingly.

Cited: State v. *Debnam*, 98 N. C., 719.

THE STATE v. JAMES GWYNN and others.

Where several defendants were included in the same indictment, which had been found during the late war and continued until after the courts were reopened; upon a motion to retax costs: *Held*,

1. That the State was entitled to but one tax.
2. That the clerk, at each continuance, was entitled to but one fee for continuance.
3. That as but one capias, including the names of all the defendants, had been issued, the clerk was entitled to but one fee for capias.
4. That the clerk was entitled to but one fee for the indictment.
5. That he was entitled to a separate fee for judgment against each defendant.
6. That he was not entitled to fees for subpœnas issued from term to term; but to only one fee for those originally issued and to another for those issued at the re-opening of the courts.

MOTION, to retax costs, made at Spring Term, 1867, of the Superior Court of Wilkes, before *Gilliam, J.*, under an indictment for assault and battery, in which the defendants (eighteen in number) had submitted and received judgment at Fall Term, 1866.

The objections were to the following items:

1. The clerk had charged each defendant with a separate tax to the State and separate fees for each con-

tinuance; for the indictment; the *capias* (there being but one, including all the names), and for judgment.

2. The bill having been found during the recent war, had been continued until the courts were closed in 1865, and was revived when they were re-opened. The clerk issued subpœnas for witnesses from term to term, and the defendants were charged with clerk's and sheriff's fees accordingly.

His Honor held that the State was entitled to but one tax, and to but one fee for each continuance of the (446) case, and to but one for the indictment and capias; but that the clerk was entitled to a separate fee for judgment against each defendant. He also held that the defendants were chargeable only for the subpœnas originally issued, and for those issued at the reopening of the courts.

From the order directing a re-taxation in conformity with the above opinion (except as regards the judgments), the clerk appealed; upon the other point the defendants appealed.

Merrimon, for the clerk.
Clement, *contra*.

BATTLE, J. In all the rulings of the court to which the clerk below excepted and from which he appealed, we concur, and direct the order to be affirmed.

We also concur in the ruling that the clerk had a right to tax a fee for judgment against each defendant; for although the defendants were included in the same indictment, the judgment was a separate one against each, and not a joint one against all.

There was no necessity for but one subpœna or set of subpœnas for the witnesses prior to the time at which the court ceased to be held, because when once summoned the witnesses were bound to attend from term to term until discharged, according to the express provision to that effect in The Code, chap. 31, sec. 60. After the court was re-opened it was proper for the clerk to issue another subpœna or set of subpœnas to summon the witnesses again. He had a right therefore to charge for two subpœnas or sets of subpœnas for the witnesses, and no more. We therefore concur also in the ruling of his Honor upon this point.

The opinion and orders of this court must be certified to the court below, to the end that the costs may (447) be re-taxed in accordance therewith. The clerk must pay the costs of the appeal.

PER CURIAM. Order accordingly.

THE STATE v. JAMES MITCHELL.

A prisoner in jail said to a fellow prisoner: "If you will not tell on me I will tell you something." The other replied that he would not tell, but if he did it would make no difference, for one criminal could not testify against another. The former added: "I want to know what to do." The other replied that if he knew the circumstances he could tell him what to do: *Held*, that confessions of a murder, made thereupon by the former to the latter were admissible in evidence.

MURDER, tried before *Warren, J.*, at a Court of Oyer and Terminer for Lenoir, held on the first Monday in August, 1867.

The prisoner had been arrested by the military authorities of the United States, for the murder of one James B. Allen, without being informed of the charge against him. Upon the trial the State offered evidence of his confessions made in prison to one Cook, who was at that time also a prisoner, for a misdemeanor, and had previously been his acquaintance.

They were made under the following circumstances. The prisoner asked the witness, What in the hell do you suppose I was arrested for? Witness replied that he did not know. After some other conversation, the prisoner said, If you will not tell on me I will tell you something. Witness said he would not tell, but if he did, it (448) would make no difference, for one criminal could not testify against another. The prisoner then said, I want to know what to do; and witness replied that if he knew the circumstances he could tell him what to do.

Objection was made to the reception of the confessions thereupon made by the prisoner, on the ground that they were improperly and illegally obtained. They were, however, received by the court.

The prisoner was convicted, and a rule having been obtained for a new trial it was discharged, and there was judgment and appeal.

No counsel for the prisoner.
Attorney-General, for the State.

BATTLE, J. The only question presented by the bill of exceptions is, whether the confession of the prisoner was admissible.

The principle upon which the competency of the confessions of a prisoner depends was well stated by Judge Henderson, in the case of the *State* v. *Roberts*, 12 N. C., 261. He said, "Confessions are either voluntary or involuntary. They are called voluntary when made neither under the influence of hope or fear, but are attributable to that love of truth which predominates in the breast of every man not operated upon by other motives more powerful with him, and which, it is said, in the perfectly good man can not be countervailed. These confessions are the highest evidences of truth, even in cases affecting life. But it is said, and said with truth, that confessions induced by hope or extorted by fear are, of all kinds of evidence, the least to be relied on, and are therefore entirely to be rejected." This principle thus clearly enunciated by a very able Judge, will be found to have pervaded every case upon (449) the subject which has been decided by this court. See Battle's Digest, Title Evidence, sec. xxvi., page 505.

The confession proposed to be proved in the present case must be regarded as coming under the head of voluntary confessions. The prisoner himself commenced the conversation which led to his confession. When the prisoner said to the witness, "I want to know what to do," he must have been aware that the witness could not tell him without knowing the circumstances of his case. When the latter told him so, therefore, he only told him that which he already knew; and what he, thereupon, went on to state to the witness was not induced by any hope of advantage held out to him by the witness, but by the suggestion of his own mind to get the witness' advice as to the course he ought to pursue. So far from being under any influence to make a false statement, he had the strongest motive to tell the truth, so that the advice of his acquaintance might be of service to him. In this view of the question, the mistake of the witness as to the law about one prisoner testifying against another, can not make any difference. The prisoner could not thereby have been in the least induced to make a false statement of the facts and circumstances of his case. All that can be said is, that he found himself placed in a difficult and dangeros position, and wanted the advice of a friend as to the best course to be pursued for his relief. To obtain that advice he voluntarily unbosomed himself to a person who he thought might be trusted, but who afterwards proved treacherous and disclosed his secret. We do not know of any such ground for excluding confessions, and think the Judge was right in admitting them.

It must be certified that we find no error in the record.

PER CURIAM. No error.

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(450)

THE STATE v. JULIA LEAK.

Where the nurse of an infant, knowing that laudanum was poison and likely to kill, gave the child enough to kill it: *Held*, (nothing else appearing to qualify the presumption of law) that she was guilty of murder.

MURDER, tried before *Warren, J.*, at Fall Term, 1867, of the Superior Court of Richmond.

The prisoner was the hired nurse of the deceased, a child some six weeks old. It was shown that some days before the laudanum was administered the child's mouth and clothing had marks of blueing upon them, although the nurse had been told that it was poison. Upon being questioned about it, she had given an improbable account of the manner in which it had occurred. On the 3d day of August, 1867, the child's mother, upon going to dinner, left the nurse and child alone. Shortly afterwards the child, which had been perfectly well when left, screamed violently, and the nurse began to sing, as if to drown the noise. Upon going into the room, the mother found the vial of laudanum uncorked and the laudanum shaking; and there was laudanum upon the child's mouth and dress. Upon being charged with giving laudanum to the child, the prisoner denied it, saying she had not given it a drop, that she had been smelling it and dropped a little upon its dress. A physician was then sent for. The child went to sleep in half an hour, and did not awake again, dying about 2 o'clock the next night.

The prisoner had been told a day or two before that the laudanum was poison; the bottle was then shown to her as poison, and she was directed to take it (451) from a bureau and place it upon the mantle-piece. There was no one in the room with the child but the prisoner. The child was healthy and had never taken laudanum. Other evidence was given to show that the prisoner had administered the laudanum, but it is not material to state it.

The prisoner's counsel requested the Judge to charge—

1. That if the prisoner gave the laudanum in order to put the child to sleep, the case was one neither of murder nor manslaughter, but of misadventure only.

2. That if in giving the laudanum the prisoner intended neither to kill it, nor to do it great bodily harm, she was not guilty of murder.

3. That if she administered it carelessly, or by way of experiment only, she was guilty of manslaughter only.

The court refused to give the first instruction, and told the jury that there was no evidence in the case to which it was applicable. The second instruction also was refused, and the court charged that if the prisoner gave the laudanum knowing what it was and that it was likely to kill, the law presumed malice and the case would be one of murder; but that if she did not know the character of the laudanum as a poison, etc., it would be no more than manslaughter; that upon this point the burden of proof was upon the prisoner. The court gave the third instruction substantially as asked for.

Verdict, Guilty. Rule for new trial discharged. Judgment, and appeal.

Phillips & Battle, for the prisoner.
Attorney-General, *contra.*

READE, J. The first exception to his Honor's charge was properly abandoned in this court, as there was no evidence to which it was applicable.

(452) The second exception is liable to the same objection, and to the further objection that, while his Honor did not give the charge upon the abstract proposition as asked, yet he did give such a charge as fitted the evidence.

The evidence was that the prisoner had been told a few days before that the laudanum was a poison. We may suppose that she also knew that it was a medicine, but that there was no occasion to use it as a medicine, inasmuch as the child was in good health, and no laudanum had ever been given to it. She must have poured the poison out of the vial into the child's mouth, as there was no cup or spoon. When the mother ran into the room, when she heard the child's scream, the prisoner was standing, with the child in her arms, near the vial, which had just been set down uncorked, the liquid being still in motion. The poison was in the child's mouth and upon its clothes. The prisoner tried to drown the child's scream, and when the mother charged her with giving the child laudanum, she denied it, saying she had been only smelling it and spilt it on the child. She knew it was poison. She knew poison would kill. She poured it down the child's throat, and attempted to conceal what she had done by a falsehood. There was not a single fact in the case tending to show that the prisoner did not know that it was poison, or that she did not intend the reasonable consequence of her act. How could his Honor leave it to the jury to suppose that she did not intend it? If A deliberately point his gun at B, and discharge it and kill him, could his Honor charge the jury that if he did not intend to kill, he would not be guilty? When an act is proved, and there is no evidence of accident, the question of accident can not be left to the jury any more than any other fact upon which there is no evidence.

His Honor charged substantially, that if the prisoner knew that it was poison, and that it was likely to kill, and gave it under the circumstances detailed, and (453) it did kill, she was guilty. We think this gave the prisoner the benefit of every consideration to which she was entitled. The proof was that she knew it was poison; that there was no reason why she should have given it as a medicine, she did not pretend that she had so given it, but denied that she had given it at all. The reasonable consequence was killing; it did kill; there was no evidence that she did not intend to kill; and therefore it must be taken that she did intend to kill. There is no error.

Let this be certified, etc.

PER CURIAM. No error.

THE STATE v. A. B. RHODES.

1. The laws of this State do not recognize the right of the husband to whip his wife, but our Courts will not interfere to punish him for moderate correction of her, even if there had been no provocation for it.
2. Family government being in its nature as complete in itself as the State government is in itself, the Courts will not attempt to control, or interfere with it, in favor of either party, except in cases where permanent or malicious injury is inflicted or threatened, or the condition of the party is intolerable.
3. In determining whether the husband has been guilty of an indictable assault and battery upon his wife, the criterion is the effect produced, and not the manner of producing it or the instrument used.

(*S. v. Hussy*, 44, 123; *S. v. Black*, 60 N. C., 262, cited and approved; *S. v. Pendegrass*, distinguished and approved.)

ASSAULT AND BATTERY, tried before *Little*, *J.*, at Fall Term, 1867, of the Superior Court of Wilkes.

The defendant was indicted for an assault and (454) battery upon his wife, Elizabeth Rhodes. Upon the evidence submitted to them the jury returned the following special verdict:

"We find that the defendant struck Elizabeth Rhodes, his wife, three licks, with a switch about the size of one of his fingers (but not as large as a man's thumb) without any provocation except some words uttered by her and not recollected by the witness."

His Honor was of opinion that the defendant had a right to whip his wife with a switch no larger than his thumb, and that upon the facts found in the special verdict he was not guilty in law. Judgment in favor of the defendant was accordingly entered, and the State appealed.

Attorney-General, for the State.
No counsel for the defendant.

READE, J. The violence complained of would, without question, have been constituted a battery if the subject of it had not been the defendant's wife. The question is how far that fact affects the case.

The courts have been loth to take cognizance of trivial complaints arising out of the domestic relations—such as master and apprentice, teacher and pupil, parent and child, husband and wife. Not because those relations are not subject to the law, but because the evil of publicity would be greater than the evil involved in the trifles complained of; and because they ought to be left to family government. On the civil side of this court, under our divorce laws, such cases have been unavoidable, and not unfrequent. On the criminal side there are but two cases reported. In one the question was, whether the wife was a competent witness to prove a battery by the husband upon her, which inflicted no great or permanent injury. It was decided that (455) she was not. In discussing the subject the court said, that the abstract question of the husband's right to whip his wife did not arise. *State* v. *Hussy*, 44 N. C., 123. The other case was one of a slight battery by the husband upon the wife after gross provocation. He was held not to be punishable. In that case the court said, that unless some permanent injury be inflicted, or there be an excess of violence, or such a degree of cruelty as shows that it is inflicted to gratify his own bad passions, the law will not invade the domestic forum, or go behind the curtain. *State* v. *Black*, 60 N. C., 262. Neither of those cases is like the one before us. The first case turned upon the competency of the wife as a witness, and in the second there was a slight battery upon a strong provocation.

In this case no provocation worth the name was proved. The fact found was that it was "without any provocation except some words which were not recollected by the witness." The words must have been of the slightest import to have made no impression on the memory. We must therefore consider the violence as unprovoked. The question is therefore plainly presented, whether the court will allow a conviction of the husband for moderate correction of the wife without provocation.

Our divorce laws do not compel a separation of husband and wife, unless the conduct of the husband be so cruel as to render the wife's condition intolerable, or her life burdensome. What sort of conduct on the part of the husband would be allowed to have that effect, has been repeatedly considered. And it has not been found easy to lay down any iron rule upon the subject. In some cases it has been held that actual and repeated violence to the person was not sufficient. In others that insults, indignities and neglect, without any actual violence, were quite sufficient. So much does each case depend upon its peculiar surroundings.

(456) We have sought the aid of the experience and wisdom of other times, and of other countries.

Blackstone says "that the husband, by the old law, might give the wife moderate correction, for as he was to answer for her misbehavior, he ought to have the power to control her; but that in the polite reign of Charles the Second, this power of correction began to be doubted." 1 Black., 444. Wharton says, that by the ancient common law the husband possessed the power to chastise his wife; but that the tendency of criminal courts in the present day is to regard the marital relation as no defence to a battery. Cr. L., secs. 1259–60. Chancellor Walworth says of such correction, that it is not authorized by the law of any civilized country; not indeed meaning that England is not civilized, but referring to the anomalous relics of barbarism which cleave to her jurisprudence. Bish. M. & D., 446, n. The old law of moderate correction has been questioned even in England, and has been repudiated in Ireland and Scotland. The old rule is approved in Mississippi, but it has met with but little favor elsewhere in the United States. *Ibid.*, 485. In looking into the discussions of the other States we find but little uniformity.

From what has been said it will be seen how much the subject is at sea. And, probably, it will ever be so; for it will always be influenced by the habits, manners and condition of every community. Yet it is necessary that we should lay down something as precise and practical as the nature of the subject will admit of, for the guidance of our courts.

Our conclusion is that family government is recognized by law as being as complete in itself as the State government is in itself, and yet subordinate to it; and that we will not interfere with or attempt to con-
(457) trol it in favor of either husband or wife, unless
in cases where permanent or malicious injury is inflicted or threatened, or the condition of the party is intolerable. For, however great are the evils of ill temper, quarrels, and even personal conflicts inflicting only temporary pain, they are not comparable with the evils which would result from raising the curtain and exposing to public curiosity and criticism the nursery and the bed chamber. Every household has and must have a government of its own, modelled to suit the temper, disposition and condition of its inmates. Mere ebullitions of passion, impulsive violence, and temporary pain, affection will soon forget and forgive; and each member will find excuse for the other in his own frailties. But when trifles are taken hold of by the public, and the parties are exposed and disgraced, and each endeavors to justify himself or herself by criminating the other, that which ought to be forgotten in a day will be remembered for life.

It is urged in this case, that as there was no provocation, the violence was of course excessive and malicious; that every one, in whatever relation of life, should be able to purchase immunity from pain, by obedience to authority and faithfulness in duty. And it is insisted, that in the *State* v. *Pendegrass*, 19 N. C., 365, which was the case of a school-mistress whipping a child, that doctrine is laid down. It is true that it is there said that the master may be punishable even when he does not transcend the powers granted; *i. e.*, when he does not inflict permanent injury, if he grossly abuse his powers, and use them as a cover for his malice. But observe, the language is, if he grossly abuse his powers. So that every one would say at once, there was no cause for it, and it was purely malicious and cruel. If this be not the rule, then every violence which would amount to an assault upon a stranger would have to be investigated to see whether there was any provocation.

(458) And that would contravene what we have said, that we will punish no case of trifling importance. If in every such case we are to hunt for the provocation, how will the proof be supplied? Take the case before us. The witness said, there was no provocation except some slight words. But then who can tell what significance the trifling words may have had to the husband? Who can tell what had happened an hour before, and every hour for a week? To him they may have been sharper than a sword. And so in every case. it might be impossible for the court to appreciate what might be offered as an excuse, or no excuse might appear at all, when a complete justification exists. Or, suppose the provocation could in every case be known. and the court should undertake to weigh the provocation in every trifling family broil, what would be the standard? Suppose a case coming up to us from a hovel, where neither delicacy of sentiment nor refinement of manners is appreciated or known. The parties themselves would be amazed, if they were to be held responsible for rudeness or trifling violence. What do they care for insults and indignities? In such cases what end would be gained by investigation or punishment? Take a case from the middle class, where modesty and purity have their abode but nevertheless have not immunity from the frailties of nature, and are sometimes moved by the mysteries of passion. What could be more harrassing to them, or injurious to society, than to draw a crowd around their seclusion. Or take a case from the higher ranks, where education and culture have so refined nature, that a look cuts like a knife, and a word strikes like a hammer; where the most delicate attention gives pleasure, and the slightest neglect pain; where an indignity is disgrace and exposure is ruin. Bring all these cases into court side by side, with the same offence charged and the same proof made; and what conceivable charge of the court to the jury (459) would be alike appropriate to all the cases, except that they all have domestic government, which they have formed for themselves, suited to their own peculiar conditions, and that those governments are

supreme, and from them there is no appeal except in cases of great importance requiring the strong arm of the law, and that to those governments they must submit themselves.

It will be observed that the ground upon which we have put this decision, is not that the husband has the right to whip his wife much or little; but that we will not interfere with family government in trifling cases. We will no more interfere where the husband whips the wife than where the wife whips the husband; and yet we would hardly be supposed to hold that a wife has a right to whip her husband. We will not inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence. Two boys under fourteen years of age fight upon the play-ground, and yet the courts will take no notice of it, not for the reason that boys have the right to fight, but because the interests of society require that they should be left to the more appropriate discipline of the school-room and of home. It is not true that boys have a right to fight; nor is it true that a husband has a right to whip his wife. And if he had, it is not easily seen how the thumb is the standard of size for the instrument which he may use, as some of the old authorities have said; and in deference to which was his Honor's charge. A light blow, or many light blows, with a stick larger than the thumb, might produce no injury; but a switch half the size might be so used as to produce death. The standard is the effect produced, and not the manner of producing it, or the instrument used.

Because our opinion is not in unison with the decisions of some of the sister States, or with the philosophy of some very respectable law writers, and could not be in unison with all, because of their contrariety—
(460) a decent respect for the opinions of others has induced us to be very full in stating the reasons for our conclusion. There is no error.

Let this be certified, etc.

PER CURIAM. No error.

Cited: State v. *Mabrey*, 64 N. C., 592; *State* v. *Davidson*, 77 N. C., 523: *State* v *Jones*, 95 N. C., 592; *State* v. *Dowell*, 106 N. C., 724.

STATE v. GEORGE ELAM.

1. In cases of bastardy the county of the mother's "settlement" and not that of her "domicil" is chargeable with the maintenance of the child, and settlement is gained only by a continuous residence of twelve months.
2. Therefore, where the mother, having lived in Granville County for several years, removed to Franklin two or three months before the birth of her child, with a *bona fide* intention of changing her domicil, the former and not the latter county had jurisdiction of proceedings to charge the putative father.

(*State v. Roberts*, 32 N. C., 350; *State v. Jenkins*, 34 N. C., 121, and *Ferrell v. Boykin, ante*, 9, cited and approved.)

BASTARDY, tried upon a case agreed before *Fowle*, *J.*, at the Fall Term, 1867, of the Superior Court of Franklin. The proceedings were returned to the County Court, and carried from thence, by appeal of the defendant, to the Superior Court.

One Arianna Herndon, a single woman (colored), charged the defendant, a colored man, with being the father of a child of which she was delivered in March, 1867, in the county of Franklin. She had resided continuously in Granville County for ten or twelve years before January or February, 1867, when she removed to Franklin, with a *bona fide* intention of residing permanently in that county. The defendant resided in Granville, where it is admitted that the child was begotten.

(461) It was agreed that if the court should be of opinion that the court of Franklin County had jurisdiction of the proceedings, a verdict should be entered for the State; if otherwise, the proceedings should be quashed. His Honor directed a verdict to be entered in favor of the State, and gave judgment accordingly. Whereupon the defendant appealed to this court.

Edwards, for the appellant.

The Judge ought to have quashed the proceedings, upon the ground that the county of Franklin had no jurisdiction of the case. See Rev. Code, chap. 86, sec. 12, par. 1, 4, 5. Also the case of *State* v. *Roberts*, 32 N. C., 350; *Ferrell* v. *Boykin, ante*, 9.

Attorney-General, for the State.

PEARSON, C. J. The Revised Code (chap. 12) provides in general terms for proceeding against the putative father in the county where the child is born, to compel him to give bond for the maintenance of the child, so as to indemnify the county against the charge of its maintenance.

In most cases the child is born in the county where the mother has her settlement, and there is no difficulty in regard to the county in which the proceeding should be instituted.

But sometimes, as in our case, the child is born in one county, and the settlement of the mother is in another county, which makes it necessary to put a constuction on the statute, in order to see to which of the two counties the jurisdiction belongs. Indeed, the question might be still further complicated if we suppose Granville to be the county of settlement, Franklin the county of domicil, and that the mother while on a visit to (462) Wake is delivered of the child. Here Wake has the honor of its nativity, and construction must be resorted to in order to arrive at the meaning as to which of the three counties has jurisdiction.

Upon the question of construction it will be seen that the general police regulations on the subject of paupers are contained in the statute—Revised Code, chap. 86, "Poor"—and that the statute under consideration, and the statute, Revised Code, chap. 5, "Apprentices," are supplements to the "Poor" act, and intended to carry out its provisions in regard to children who are paupers. So the three statutes make one system, and are to be construed together.

The "Poor" act imposes upon every county the burthen of supporting all persons having a settlement in it, who are paupers, or who may become paupers. It provides that no one shall gain a settlement in a county unless by continuous residence for one year; and authorizes the county into which a pauper, or one who is likely to become chargeable has come, to have him sent back to the county where he has a settlement, at any time within the year; and it declares that illegitimate children shall follow and have the settlement of their mother at the time of their birth, if she then has any settlement in the State; and that neither legitimate nor illegitimate children shall gain a settlement by birth in the county in which they may be born, if neither of their parents had any settlement therein.

In other words, the liability of the county for the maintenance of a bastard child is fixed not by its birth but by the settlement of its mother at the time of its birth.

The object of the bastardy act is to compel the putative father to indemnify the county chargeable with the maintenance of the child—that is the county where the mother has a settlement at the time of its birth. It follows that where a bastard child happens to be (463) born in a county not chargeable with its maintenance, the words, "the county where such child shall be born," must give way and be construed to mean the county chargeable with its maintenance; otherwise we "stick in the bark" and have the absurdity of a county not chargeable taking a bond for its indemnity, while the county that is chargeable is left without relief.

Suppose a woman who has her domicile and also settlement in the county of Granville, goes on a visit into the county of Franklin, and while there is delivered of a bastard child, and then takes her child and goes back home; no one will say that Franklin has jurisdiction, although the child was born in that county, for that county needs no indemnity; and every one will say that Granville is the proper county to institute the proceeding, for that is the county chargeable, and, consequently, that is the county authorized to require indemnity. So, as was the case in *State* v. *Roberts*, 32 N. C., 350, if a woman having a domicil and settlement in the county of Brunswick, goes into the county of New Hanover, on purpose to be delivered there, and then goes back to Brunswick, the latter county has jurisdiction, because it is the county chargeable with the maintenance of the child, and New Hanover has no concern in it, although the child be born in that county.

It is true Judge Nash, in his opinion, lays stress on the fact that the woman went into the county of New Hanover, *mala fide*, on purpose to be delivered, and then went back. To prevent misapprehension Judge Ruffin also filed an opinion, in which the decision is distinctly put on the ground that the substance of the provision is to indemnify the county legally chargeable with the maintenance of the child. That case is followed by *State* v. *Jenkins*, 34 N. C., 121. The child was born in the county of Richmond, where the mother had her domicil and settlement; she then with her child removed to the county of Montgomery, where she resided (464) more than two years, by which continuous residence she gained a setlement in Montgomery. The proceeding under the bastardy act, instituted in the county of Richmond, was dismissed for the want of jurisdiction, on the ground that, although the child was born in Richmond, that county was not chargeable, and therefore had no right to require any indemnity. *State* v. *Roberts*, *supra*, is cited as settling the construction that the jurisdiction belongs to the county chargeable with the maintenance of the child, and not to the county in which it was born.

This case is on all-fours with our case; and it is even stronger, for there the county in which the child was born was the county of the mother's domicil and settlement; whereas, in our case, the county in which the child was born (Franklin) was only the county of the mother's domicil, and Granville was the county of her settlement. The same construction is put on the kindred statute, Rev. Code, chap. 5, "Apprentices." *Ferrell* v. *Boykin*, *ante*, 9. The mother of a base born child removed with it from the county of Nash, where she had a settlement, into the county of Wilson, but had not resided there continuously for one year. It is held that Nash, being the county of settlement, was the proper county to bind out the child, as it had no settlement in Wilson. The mother by a *bona fide* removal to Wilson, had acquired a domicil there. So in our case the mother had by a *bona fide* removal into Franklin acquired a domicil there; but in neither case had the mother acquired a settlement in the county to which she removed. And the county of the settlement is the proper county to bind out apprentices, and to institute proceedings in bastardy, for that is the county chargeable with the maintenance of the child.

It is clear from the authorities cited, and the "reason of the thing," that the county where the child is begotten and where it is born are immaterial circumstances.

(465) The gist of the matter is, which is the county of settlement? *i. e.*, the county chargeable with the maintenance of the child.

Domicil is the county in reference to the probate of wills, and grants of letters of administration, and, being merely personal, the old domicil may be changed for a new one, simply by removal from one county into another.

Settlement is the county in reference to a liability to support those who are paupers or may become paupers. And, as this is a matter which affects the county, a new settlement can not be gained without a continuous residence of one year in the county to which the party has removed.

Although in most cases the county of domicil and the county of settlement are the same, yet they are sometimes different, as in our case Granville is the county of settlement, and therefore chargeable with the maintenance of the bastard child. Franklin is the county of domicil, but is not chargeable. We can only account for the error into which the learned Judge has fallen, by supposing that his attention was not called to this distinction.

There is error. Judgment reversed. Judgment to be for defendant. This will be certified, etc.

PER CURIAM. Judgment reversed.

Cited: State v. *Hales*, 65 N. C., 245; *Commissioners* v. *Commissioners*, 101 N. C., 524.

(466)

W. R. CHERRY v. JAMES S. LONG.

1. An auctioneer is the agent of both seller and purchaser. Therefore, upon a tract of land being bid off at auction by one who is present, the auctioneer is his agent for the purpose of directing his name to be signed to an agreement to purchase.
2. A memorandum by the clerk of the auctioneer "Rayner Tract to James S. Long at $40 per acre," by order of the auctioneer, in a case where it was shown that the expression "Rayner Tract" was a well known designation: *Held*, under the circumstances, to be sufficient, within the statute of frauds.

CASE, to recover damages for breach of contract, tried at Spring Term, 1867, of the Superior Court of Edgecombe, before *Barnes, J.*

The facts appear sufficiently in the opinion of the court.

In the court below the plaintiff, on an intimation of his Honor's opinion, submitted to a verdict and appealed.

No counsel for the appellant.

Biggs and *Bragg, contra*, cited *Pettijohn* v. *Williams*, 46 N. C., 148; *Edwards* v. *Kelley*, 53 N. C., 69; *Mizell* v. *Burnett*, 49 N. C., 249; Sug. Vend., 74-79; Batten's Spec. Perf.) L. Lib., 24); Sug. Vend., app. 4 and text 10, *et seq.; Coles* v. *Trecothick*, 9 Ves., 234; Suq., 75.

PEARSON, C. J. From the manner in which the case is made up, the intention was to present this simple point: At a public sale of land, a tract is bid off by the defendant; the auctioneer says, "Put it down to James

S. Long," whereupon the clerk enters on his sale list, in the presence of Long, "Rayner tract to James (467) S. Long at $40 per acre." Is this a sufficient signing of a note or memorandum of the contract, within the statute of frauds?

On the argument Mr. Bragg was forced to admit that, according to the English cases, this is a sufficient signing by the authority of the defendant, for it was done in his presence, so the authority was express. Sug. Vend., 74 to 77. He then raised the question that the terms of description are not sufficient; but the case states that the "Rayner tract" was a well-known designation. He then made the point that the memorandum was not sufficient, inasmuch as the terms of sale are not set out in it. As this was a sale under a power given by will to sell certain lands, and the case states that the sale was made after advertisement, and the original counsel of the defendant, Mr. Biggs, in his brief filed in the case, makes but two points: 1st. The auctioneer and clerk were agents only of the plaintiff. 2. The statute of frauds makes void the contract, although it was at an auction sale. We must take it that the advertisement contained the terms of sale, as is usual in such cases. So all that we are to decide is, that this written memorandum and signing of the name of the defendant by the clerk, taken in connection with the terms of sale, is a compliance with the statute. *Bartlett* v. *Purnell*, 31 Eng. C. L., 180, is a direct authority for this; for there it is taken to be settled that the auctioneer is the agent of both parties, and the entry on his lists, taken in connection with the advertisement, is a compliance with the statute, although that case went off on the point that the bidder was at liberty to prove a special agreement with the vendor, by which she was not to be held up to the terms set out in the advertisement.

There is error. Judgment reversed and *venire de novo*.

PER CURIAM. *Venire de novo.*

Cited: Gwathmey v. *Cason*, 74 N. C., 7.

(468)

STATE v. REID LINDSAY.

1. Under the plea of former conviction, if the acts alleged in the second indictment are embraced in the first, and relied upon to sustain that indictment and to increase the punishment of the defendant, he is entitled to an acquittal; therefore,
2. Where one was indiced for an assault and battery, and it was proved that, in a former indictment against him and others for a riot, the assault charged had been given in evidence, with other acts of like character, his conviction of the riot is a bar to the second prosecution.

(*State v. Stanly*, 49 N. C., 290; *S. v. Ingles*, 3 N. C., 148; and *S. v. Com. Fayetteville*, 6 N. C., 371, cited and approved.)

ASSAULT AND BATTERY, tried before *Buxton*, *J.*, at Spring Term, 1867, of the Superior Court of Caldwell.

The defendant was charged with committing an assault upon one R. B. Dula in the town of Lenoir, and at the trial relied upon the plea of former conviction. In support of his plea he introduced the record of his conviction at the same term under an indictment for a riot, and proved that, on that trial, the State had given in evidence, among other acts of the defendant and his associates calculated to disturb the public peace, the assault on R. B. Dula, for which he is now indicted The defendant asked the court to charge that the former conviction was a bar to this indictment. The court refused so to charge, and the defendant excepted.

Verdict for the State. Rule for a new trial. Rule discharged. Judgment, and appeal.

Folk, for the appellant.

The following propositions are sustained by the authorities entitled to most respect:

(469) 1. When the acts alleged in both indictments are so blended together, that the charge in the second must have been considered by the court in passing on the first, a conviction on the first indictment is a bar to the second prosecution. If a man be convicted of an assault he is protected thereby from prosecution for the battery. So a conviction of a riot in a meeting-

house during public worship, is a bar to a subsequent indictment for disturbing the religious assembly. *State* v. *Townsend*, 2 Har., 543; see also *State* v. *Cooper*, 1 Green., 31; *State* v. *Fayetteville*, 6 N. C., 371; *Fidler* v. *The State*, 7 Humph., 508.

2. If the acts alleged in the second indictment are embraced in the charge contained in the first, and have been given in evidence to procure the first conviction, and increase the punishment, the first conviction is a bar to any second prosecution for those acts. *Commonwealth* v. *Kinney*, 2 Va. Cases, 139; 1 Bish. Cr. Law, 890; *State* v. *Ingolds*, 3 N. C., 148. For upon the first indictment the court receives evidence of all the concomitant facts and will apportion the punishment to the nature of the offence as enhanced by all these circumstances. Hence the rule laid down by a recent writer on criminal law, "a prosecutor may carve as large an offence out of the transaction as he can, but he shall not cut but once." 1 Bish. Cr. Law, 892.

Attorney-General, contra.

BATTLE, J. In the case of the *State* v. *Stanly*, 49 N. C., 290, it is said that "The plea of *antrefois convict*, like that of *antrefois acquit*, is founded upon the principle that no man shall be placed in peril of legal penalties more than once upon the same accusation"; and for this is cited 1 Chitty, Criminal Law, 252-462. The principle is clear, but there has been much difficulty in its application to the great variety of (470) cases which have arisen on the subject. It is unnecessary for us to refer to many of them, because we think that the second proposition contended for by the counsel for the defendant is supported by decisions of this court, and is decisive of the present case. The proposition is that "If the acts alleged in the second indictment are embraced in the charge contained in the first, and have been given in evidence to procure the first conviction, and increase the punishment, the first conviction is a bar to any second prosecution for those acts." Thus in the case of *State* v. *Stanly*, *supra*, it was held that, if a party has been convicted and punished in the County Court upon an indictment for an affray, he can not be tried again in the Superior Court upon an indictment for an assault and battery relating to the same transaction. So in *State* v. *Ingles*, 3 N. C. (p. 148 of the 2d ed.), it is said that a former conviction of another offence of a different denomination, but grounded on the same facts as those relied on in the second indictment, is a bar. See also *State* v. *Commissioners of Fayetteville*, 6 N. C., 371.

In the case before us the assault and battery charged in the bill was undoubtedly relevant to prove the participation of the defendant in the riot alleged in the former indictment. The bill of exceptions shows that it was in fact proved on the trial for riot, and for anything that we know, it may have been the cause of the defendant's conviction on that trial. To sustain an indictment for the same act, though charged as a different offence, would be therefore to punish the defendant twice for the same criminal act, which can not be allowed.

The judgment must be reversed and a *venire de novo* awarded.

PER CURIAM. *Venire de novo.*

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(471)

ROBERT C. GIBBS v. DURANT H. GIBBS.

Where a guardian collected a bond due to his ward by solvent persons in November, 1863, in Confederate currency, nearly two years after the ward became of age: *Held*, that at the suit of the ward he was chargeable with the full amount of the bond and interest.

(*Emerson v. Mallett*, 62 N. C., 234, cited and approved.)

PETITION against a guardian for a settlement, heard upon an exception before *Shipp, J.*, at Fall Term, 1867, of the Superior Court of Hyde.

The petition had been filed at February Term, 1866, of the County Court, and an account having been taken, the report of the commissioner was returned to May Term, 1867. At this last term the petitioner excepted to an item crediting the defendant with some one thousand six hundred dollars for Confederate money collected by him upon a note due by one James Adams to him as guardian. Upon this exception it appeared that the parties to the note were good, that the petitioner had been of age for nearly two years at the time it was collected, and that the Confederate notes were received for it in November, 1863

In the County Court this exception was overruled; and upon appeal to the Superior Court it was sustained.

Thereupon the defendant appealed.

No counsel for the appellant.

Rodman, *contra*.

READE, J. There are two reasons why the plaintiff's exception as to the James Adams debt should have been sustained.

(472) First. The defendant's ward (the plaintiff) had been of age nearly two years when he collected the debt, and he ought to have delivered over the bond to the plaintiff, or paid him the amount.

Second. At the time the defendant collected the bond, November, 1863, the Confederate Treasury notes, in which he collected it, were worth only six or eight cents in the dollar. To collect a good debt under such circumstances was trifling with the plaintiff's interests. *Emerson* v. *Mallett*, 62 N. C., 234.

The report will be reformed by the clerk of this court by charging the defendant with the James Adams debt and interest.

There may be a decree for the plaintiff for the balance due him.

The cost, including ten dollars to the clerk for reforming the account, will be paid by the defendant.

There is no error.

PER CURIAM. Decree accordingly.

Cited: Pearson v. *Caldwell*, 70 N. C., 293; *Love* v. *Johnston*, 72 N. C., 420.

(473)

THE STATE v. WILLIAM W. PARKER.

1. In a case where an indictment for murder was based upon circumstantial evidence tending to show that the homicide had been accompanied by robbery, and the prisoner, in whose possession soon afterwards the things taken were found, denied having inflicted the fatal blow: *Held*, that the presiding Judge was correct in charging that the prisoner was guilty of murder, or of nothing.
2. Where a Judge otherwise administers the law correctly, held not to be error for him to decline using the very words in which an important legal proposition has been accurately laid down in another case; and that sometimes circumstances attending a trial may render it improper for a Judge to define a legal principle in the very words that were strictly correct in another case.
3. There is no "formula" to which judges may resort for guaging the degree to which a jury must be convinced in order to justify a verdict of guilty, and attempts to create such have resulted in no good.

(*State v. Sears, ante*, 146; *State v. Knox, ante*, 312, cited and approved.)

MURDER, tried before *Meares, J.*, at a term of the Criminal Court of New Hanover, held on the first Monday in June, 1867.

The deceased (one William Childress) was killed on Sunday night, 29th March, 1863, and his body was found shortly afterwards in Smith's Creek, about one mile from Wilmington. On the side of the creek, a few feet off, a large quantity of blood was found, and there were marks of a scuffle. Some twenty wounds were upon the body, two of which had been inflicted by a large knife, and were sufficient to produce immediate death. On the day before, the deceased was wearing a gold watch, which was described, and a considerable amount of Confederate and also of United States currency. He was a subject of Great Britain and had about him a "British protection paper" against (474) conscription. On Sunday afternoon he was at a house in Wilmington, the last towards Smith's Creek, occupied by some women, and the prisoner and two other men (Dunn and Runciman) were with him. After frequent invitations by the prisoner and Runciman, the deceased at last, about dark, consented to take a walk with them, and they went off in the direction of Smith's Creek. Deceased then had on the watch, and prisoner had a large bowie knife. About midnight the prisoner and Runciman returned and asked for water, which Dunn went out and gave them, and then they went off, returning again about light with a number of dead chickens, some of them with their heads taken off, the men's clothing having much blood upon them, which they tried to scrape off, saying it was from the chickens.

On Monday the prisoner and Runciman were in a store together under false names, offering to sell a gold watch, and exhibiting Confederate and United States currency, also a "British protection paper," which prisoner said would prevent him from being "conscripted"; and on the same or the next day Runciman, having been wounded in an affray, was arrested and the "paper" was found upon him, and he afterwards gave some currency (as above) to a friend. On Sunday night, about half-past 11 o'clock, the prisoner and Runciman were at a shop standing by the fire, and prisoner had a watch, which a witness believed was the same exhibited by the deceased on the day before; and this caused that witness to take steps to have the prisoner arrested. On Tuesday succeeding, the prisoner when in jail had a large bowie knife which he said belonged to him, and two physicians testified that there was blood on the handle and blade, and one physician said that in his opinion it was human blood; and the blade, being applied to one of the mortal wounds upon the body of the deceased, fitted in it. On the same occasion, the (475) sheriff opened the breast of the prisoner's coat, and his clothing beneath was found stained with blood. When asked about this, the prisoner said nothing. At the same time another prisoner produced a watch (identical as that of the deceased), and said that the prisoner gave it to him to keep. This the prisoner denied, but afterwards in same conversation admitted that the watch was his, and that he had brought it from

Virginia; and said that he had denied it at first because some one had been there a little before to inquire about it.

The counsel for the prisoner requested the Court to charge the jury that if any reasonable hypothesis could be made out consistent with the prisoner's innocence, they must acquit; and that a presumption could be raised only from a fact, and not from another presumption; that having to presume the prisoner's presence at the murder from the fact that he was seen going in that direction with the deceased, they could not also presume from this presumption that he was the murderer or was present aiding and abetting.

The Court reviewed the evidence at length, and upon one part of the case charged the jury "that there were no nice distinctions of law to be drawn or explained in this case, as between the different degrees of homicide, because the prisoner denied the homicide, and there was no evidence to rebut the presumption that whoever committed it was guilty of murder; that there was no halfway ground on which they could compromise, and they must either convict of murder or acquit; that they must be convinced beyond a reasonable doubt that the prisoner was present and committed homicide or aided and abetted it, before they could convict him; that the presumption of his mere presence was not sufficient for conviction, but that if the jury believed that he was present and that a robbery accompanied the homicide, and the prisoner soon afterwards was found in the possession of valuable property which was the sub- (476) ject of the robbery, and that the prisoner had given no reasonable or satisfactory explanation of the manner in which he came into the possession of the property, and that the evidence in the case furnished no explanation of the manner in which he came into possession of the property consistent with his innocence, that then they ought to convict him."

After the charge had been closed the counsel for the prisoner requested the Judge to instruct the jury in the language used in the case of *The State* v. *Swink*, 19 N. C., 9: "That in cases of circumstantial testimony the evidence must be as strong and clear as if derived from the evidence of one credible and respectable witness."

The court said that it adopted the decision in that case, but that it meant no more than that they should be convinced beyond a reasonable doubt, as they had already been told.

Verdict, Guilty. Rule for new trial discharged. Judgment, and appeal.

No counsel for the appellant.

Attorney-General, for the State.

PEARSON, C. J. This was a case of circumstantial evidence. His Honor left it to the jury to say whether, from all of the facts and circumstances, they were satisfied by the evidence that the prisoner inflicted a mortal wound, or was present aiding and abetting the act. There certainly was evidence tending to prove the guilt of the prisoner, and we think he has no right to complain of the manner in which his Honor put the case to the jury.

If the prisoner inflicted the mortal wound, or was present aiding and abetting the act, the idea of manslaughter, or of excusable or justifiable homicide, was out of the question. It was either a case of cold-blooded murder, for the sake of getting the property and money of the deceased, or else the prisoner was entitled
(477) to a verdict of acquittal, because no offence had been proved.

The instruction asked for in regard to a "reasonable hypothesis consistent with the innocence of the prisoner," and "that a presumption could only be raised from a fact, and not from a presumption; and, that having to presume the prisoner's presence at the murder from the fact of his going in that direction in company with the deceased, the jury had no right to presume from this presumption that he was the murderer or present aiding and abetting," was, in our opinion, fully responded to by his Honor's charge. The fact of "the prisoner's going in that direction in company with the deceased," was not the only fact from which his presence at the murder, and his participation in the crime could be presumed. There were many other facts bearing upon the matter; and the prisoner's counsel was not at liberty to ask for an instruction predicated on the ground that there was no other fact in evidence, and thereby isolate the point.

We think the prisoner has no ground of complaint in reference to the refusal of his Honor to adopt the very words used in Swink's case without explanation. The truth is that no set of words is required by law, in regard to the force of circumstantial evidence. All that the law requires is, that the jury shall be clearly instructed that, unless after due consideration of all of the evidence, they are "fully satisfied," or "entirely convinced," or "satisfied beyond a reasonable doubt" of the guilt of the prisoner, it is their duty to acquit, and every attempt on the part of the courts to lay down a "formula" for the instruction of the jury, by which to "guage" the degrees of conviction, has resulted in no good. *State* v. *Sears*, *ante*, 146; *State* v. *Knox*, *ante*, 312.

"The evidence must be as strong to authorize conviction, as if proved by one credible and respectable (478) witness." What degree of certainty is fixed by this proposition? It, of course, must depend upon the attendant circumstances. These differ in every case and never rest upon the testimony of a single witness; *e. g.*, the connection of the parties, were they strangers, friends or enemies; the motive for the act; the conduct of the prisoner after the act; attempts at concealment; telling lies, etc. So the proposition, although it may sometimes serve the purpose of illustration, is not, and can not be made a rule of law; consequently it is not error to decline to instruct the jury in these very words.

On the contrary, when the presiding Judge thinks from the course of the argument, and the signification given to the words by counsel, that, to use the very words would tend to give the jury a wrong impression as to what the law requires, it is his duty to use other words, or, if he adopt the very words, to do so with such an explanation as will convey to the minds of the jury a counter impression, and prevent misapprehension, as was done by his Honor in this case.

Many things occur at the trial below, which it is impossible to communicate to this court. Such things can not be reviewed and must be left to the judgment and good sense of the Judge who conducts the trial. This court can only interfere when error appears.

There is no error. This will be certified, etc.

PER CURIAM. There is no error.

Cited: *State* v. *Gee*, 92 N. C., 761; *State* v. *Debnam*, 98 N. C., 718; *State* v. *Brabham*, 108 N. C., 797; *State* v. *Rogers*, 119 N. C., 796.

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(479)

PINKNEY WEAVER v. JESSE W. PARKER and BENJ. HESTER.

1. A record of proceedings under the poor debtor law, in favor of one not shown to have been at the time of such proceedings in possession of articles set apart to him, is not admissible as evidence in a suit for those articles, between third persons.
2. The burden of proof in the Supreme Court is upon him who alleges error; the presumption is against it.

TROVER, for a mare and two colts, tried at Fall Term, 1867, of the Superior Court of Orange, before *Mitchell, J.*

The defendants claimed title under one John Weaver, who was shown to have been for a long time in possession of the animals. Evidence of his acts and declarations, whilst in possession to them, affecting the title, was given by both parties. Defendants also offered in evidence a record (dated December 10, 1857) of the proceedings set on foot by John Weaver to obtain the benefit of the poor debtor law—in the course of which it was alleged that the animals had been set apart to him. Upon this point it appeared that the mare remained in John Weaver's possession as above "until the

7th of December, 1857, when the defendants took the mare, and a few days thereafter the colts, and sold them as John Weaver's property."

The opinion of the court renders it unnecessary to state the facts more at length.

The plaintiff having recovered a verdict in the court below, the defendants moved for a rule for a new trial, which having afterwards been discharged, judgment was rendered and the defendants appealed.

(480) *Graham*, for the appellants.

The evidence that John Weaver, whilst in possession, caused the animals to be laid off to himself, should have been admitted. *Askew* v. *Reynolds*, 18 N. C., 367; *March* v. *Hampton*, 50 N. C., 382; *State* v. *Emery*, 51 N. C., 133.

Norwood, *contra*.

READE, J. The acts and declarations of John Weaver, while he was in possession of the property in controversy were offered and admitted on both sides during the trial, as explanatory of his possession. The proceedings under the poor debtor laws, at the instance of John Weaver, by which a portion of the same property was allotted to him, were then offered by the defendants for the same purpose and were objected to, and ruled out by his Honor; and the exception to that ruling is the only point in the case as presented to us.

The reason why the evidence was rejected is not stated, and we were at a loss to see any reason for it, until we discovered from the case made for the Supreme Court that the mare in controversy was taken out of John Weaver's possession by the defendants on the 7th day of December, 1857, and the colts a few days thereafter. The proceedings, which were rejected, were dated the 10th day of December, 1857. The mare was at that time evidently not in John Weaver's possession, but had been taken out three days before; and, although it is not stated, as it ought to have been, whether the colts were also taken out of his possession before the 10th December, but only that they were taken out a few days after the 7th December, yet we must infer that it either appeared that the colts were not in his possession on the 10th, or that it did not appear whether they were or not. In that view of the case his Honor's ruling (481) was right; and we are to take it to have been right, unless the exception shows that it was wrong.

There is no error.

PER CURIAM. Judgment affirmed.

THE STATE v. ARCHIBALD KEARZEY.

1. Applications for a new trial because a verdict is against the weight of the evidence, are addressed to the discretion of the judge below, and therefore can not be reviewed by the Supreme Court.
2. Petit larceny might at common law be punished by imprisonment.
3. It is no ground for a motion to quash an indictment, or to arrest judgment, that the defendant was convicted upon an indictment found by a grand jury in 1863; while the rightful State government was suspended.

(*State v. Sears, ante,* 146, cited and approved.)

LARCENY, tried before *Mitchell, J.*, at Fall Term, 1867, of the Superior Court of Granville.

The indictment was found at May Term, 1863, of Granville County Court, and at May Term, 1867, of the same court the defendant was convicted. Having appealed from the judgment of that court, a motion was made before his Honor to quash the proceedings, for want of jurisdiction in the court in which the indictment was found, which motion was not allowed.

The evidence showed that the defendant, under a search warrant for other stolen goods, had been found in possession of certain hubs made of walnut, which belonged to one Crabtree. He at the time accounted for their possession by saying he had bought them of one Grissom, a wagon maker, who it was afterwards (482) shown had left the country before some of the hubs had been made. At the term of the court at which the bill was found the defendant, not then knowing of the prosecution, went to Crabtree and proposed to settle the matter about the hubs, saying that he had bought them from a wagoner whose name he did not know, and that if he got out of that scrape he would take care whom he dealt with next time. Other evidence given in is not material here.

The jury having convicted the defendant, his counsel moved to arrest judgment, because:

1. The alleged larceny could not be punished at common law; inasmuch as Sickles' Order No. 10 abolishes all existing punishment for larceny of values under twenty-five dollars, except the imprisonment there specified, and that imprisonment can not be awarded because the offence was committed before the order was made.

2. Because the County Court of Granville had no criminal jurisdiction when the bill of indictment was found.

These motions were overruled, and judgment was pronounced. The defendant appealed.

Cantwell, for the appellant.

Gen. Sickles' "Order No. 10" renders this offence dispunishable. Dwar. Stat., 673; Broom's Max., *Leges posteriores, etc.; Davis* v. *Fairbanks*, 3 How., 636.

The County Court of Granville, at May Term, 1863, had no jurisdiction of such cases. Act of 15th March, 1866 (Ext. Sess., p. 21); Opinion in Hughes' case, *ante*, 57; Gen. Canby's recent Order in case of Henderson Cooper, of Granville County

The ordinance cited in Sears' case, *ante*, 146, intends that officers who have acted under *de facto* laws (483) and judgments, shall be protected, and does not mean that such judgments and proceedings shall be a valid basis for further proceedings thereupon to be had now.

The motion to quash was made in apt time, and distinguishes this case from that of Sears.

Attorney-General, *contra*, cited *State* v. *Sears*, *ante*, 146; Rev. Code, chap. 34, sec. 26; 4 Bl., 237, 3 Inst., 109 and 218.

READE, J. Where there is any evidence, its sufficiency is a question for the jury and not for the Judge. After verdict the objection that the verdict is against the weight of the evidence is addressed to the discretion of the Judge below, and this court can not review its exercise.

The first motion in arrest of judgment involves the question whether petit larceny was punishable by imprisonment at common law, or only by whipping.

"The judgment herein was in ancient times referred to the discretion of the Judge, as in Bracton's time; in Britton's time sometimes by the pillory and sometimes by the loss of the ear. But in, and since the reign of Edward III, no persons lost any member for petit larceny, but were sometimes punished by imprisonment, and sometimes by other penance, as whipping, etc. 3 Inst., 218."

"The inferior species of petit larceny is only punished by imprisonment or whipping at common law. 4 Black., 237."

The second ground in arrest of judgment, that the County Court had not jurisdiction of the offence, was fully considered and decided at the last term of this court in *State* v. *Sears*, *ante*, 146.

The motion to quash for want of jurisdiction was properly disallowed. *State* v. *Sears*, *supra*.

There is no error.

(484) Let this be certified to the court below that further proceedings may be had according to law.

PER CURIAM. There is no error.

Cited: *State* v. *Putney*, *post*, 544.

Doe on dem. of COLIN KING and wife v. WILLIAM P. LITTLE.

A deed in fee executed in 1859, which contained a memorandum that it was executed instead of a lost deed executed in 1854, conveyed all the estate which the vendor had in the land at the time of its execution, and not that only which he had in 1854.

EJECTMENT, tried before *Mitchell, J.*, at a Special Term of the Superior Court of Mecklenburg, held upon the second Monday in December, 1867.

The facts appear sufficiently in the opinion of the court.

Under the charge of his Honor the plaintiff had a verdict in the court below, and after failing to obtain a new trial the defendant appealed.

Boyden & Bailey, for the appellant
Osborne, *contra*.

READE, J. The plaintiff claims title under a deed from H. B. Williams, dated July, 1859. The defendant claims title under a deed from the same (Williams), dated August, 1860; so that, nothing more appearing, the deed of the plaintiff's lessors being the older, he would be entitled to recover. But the defendant relies upon the following state of facts to invalidate that deed:

In 1854, the said Williams was the owner of the (485) land, and conveyed it to Mrs. King; and in 1856, Mrs. King conveyed it to one Jones; in 1857 Jones conveyed it to Williams, so that the title came back a second time to Williams; and then Williams, in July, 1859, conveyed a second time to Mrs. King. The first deed of Williams to Mrs. King, in 1854, was lost, and his second deed, of 1859, was made to supply the place of the lost deed. At the foot of the deed of 1859 there is a memorandum to that effect. Thereupon, the defendant says that the deed of 1859 did not pass the title as of that date, but only as of the date of the old lost deed of 1854; that, in all respects, the deed of 1859 was to be treated as if it were in fact the deed of 1854, and not a conveyance in 1859; and then, that being so, and the said Williams having acquired the title from Jones in 1857, and not having passed that title out of him by the deed of 1859 to Mrs. King, the title remained in him until 1860, when he conveyed it to the defendant.

The theory is very ingenious, but quite fallacious. The deed of 1859 to Mrs. King professes to convey and does convey the title which Williams then had to the land. The memorandum was only explanatory. The deed of 1854, and all the subsequent deeds, were really for the benefit of Mrs. King, who was then the wife of an insolvent husband; and the conveyance of 1854, and the loss of the deed was the real consideration of the deed of 1859.

A conveyance of land in 1859, upon a consideration paid in 1854, is not a conveyance as of 1854, but is a conveyance in 1859. Williams had the title to the land in 1859, at the time of his deed to Mrs. King, and, therefore, the defendant got no title by his deed.

The question of fraud was properly abandoned in this court.

There is no error.

PER CURIAM. Judgment affirmed.

Cited: Little v. *King*, 64 N. C., 362.

(486)

THE STATE v. REUBEN WRIGHT and MINTA HAIRSTON.

Where one who had been sworn as a witness upon a coroner's inquest, and denied all knowledge of the alleged homicide, within three or four hours afterwards was arrested as one of the guilty parties, and then proposed to tell what she knew about the homicide, and accordingly gave material evidence against herself: *Held*, that the confessions were voluntary, and competent evidence afterwards upon her trial for murder.

(*State v. Jefferson*, 28 N. C., 305; *State v. Gregory*, 50 N. C., 315; *State v. Scates*, *Id.*, 420; *State v. Fisher*, 51 N. C., 478; *State v. Young*, 60 N. C., 126, cited and approved.)

MURDER, tried at Fall Term, 1867, of the Superior Court of Stokes, before *Mitchell, J.*

The following is the case as made out by the Judge below.

The defendants were indicted for the murder of Silas Hairston (colored), husband of the defendant Minta. The body of said Silas was discovered in the river on the sixth day after he was murdered. On the next day the coroner held an inquest over the body, and in the course of his investigations concerning the death, called, swore and examined a number of witnesses, among whom was the defendant Minta, who, on her examination, disclaimed all knowledge of it. The house in which the deceased and Minta lived was about half a mile from the spot where the inquest was held. About three or four hours after her examination, a search of this house disclosed matters that seriously implicated Minta in the murder, and she was taken into custody at the house of a Mr. Adams, under whose control as manager of the plantation, she then was.

After she had been under restraint about an hour, she said that she wished "to tell about the murder of her husband." Mr. Adams requested one or two of the jurors to attend, and she was permitted to make (487) a statement which contained material evidence of her guilt.

The State having proposed to give in evidence this confession, it was objected to on the ground that she had been sworn and examined on the inquest, and at the time of the statement was under arrest. The evidence was admitted, and prisoner excepted.

Verdict, Guilty. Rule for a new trial discharged. Judgment, and appeal.

No counsel for the prisoners.

Attorney-General and *Batchelor, contra.*

It does not appear that the confession was not voluntary. *State* v. *Cowan*, 29 N. C., 239; *State* v. *Patrick*, 48 N. C., 443; *State* v. *Fisher*, 51 N. C., 478.

It is conceded that the examination of the accused, if taken on oath, is not admissible. *State* v. *Young*, 60 N. C., 126; Roscoe, 55, 1 Gr. Ev., sec. 225; but this is not so where the person was examined as a witness against another. *State* v. *Broughton*, 29 N. C., 96; 1 Gr. Ev., sec. 225; Roscoe, 45, 46, 55.

Here the confession was not upon oath; if her examination before the coroner was admitted, it does not appear to have been objected to. *State* v. *Fisher*, *supra*, and cases cited.

BATTLE, J. No bill of exceptions has been filed on behalf of the prisoner, Reuben Wright, and, as we have not been able to discover any error in the record as to him, it must be so certified to the Superior Court for the county of Stokes.

On the bill of exceptions of the other prisoner, Minta Hairston, the only ground upon which a new trial was moved for, was that her confessions were improperly admitted in evidence against her. It is contended on her behalf that her confessions were not voluntary, because she had been previously examined on oath, (488) and was under arrest at the time when she made them. In reply to this, it is said by the counsel who appears for the State that, in her examination before the coroner, she not only said nothing to criminate herself, but disclaimed all knowledge of the transaction, and her statement afterwards appears to have been entirely free and voluntary. They are certainly to be taken as such, unless her being under arrest has made them otherwise. That it has not appears from many authorities. Among other cases, see *State* v. *Jefferson*, 28 N. C., 305; *State* v. *Gregory*, 50 N. C., 315; *State* v. *Scates*, *Ib.*, 420; *State* v. *Fisher*, 51 N. C., 478. See also *State* v. *Young*, 60 N. C., 126, and the authorities there referred to.

It must be certified that we find no error in the record as to this prisoner also.

PER CURIAM. No error.

Doe on dem. of ARAS B. COX and another v. JOSEPH GRAY.

A vendee who enters in possession of land under a contract of purchase, and afterwards fails to pay the price agreed upon, is not within the terms of the Rev. Code, c. 31, s. 48, which require tenants to give bond before pleading in ejectment.

(*Love v. Edmondson*, 23 N. C., 152, cited and approved.)

MOTION, in an ejectment cause, heard before *Gilliam, J.*, at Spring Term, 1867, of the Superior Court of Wilkes.

The declaration having been returned to that term, the lessor of the plaintiff made an affidavit that Joseph Gray, the tenant in possession, had entered into possession of the land in question under a treaty for its (489) purchase, and so became his tenant; that he had subsequently failed to make payment as agreed, and that thereupon possession had been demanded and refused, by which the term of the tenancy had expired, and that Gray was now holding over, etc.

A counter affidavit was filed by Gray, but, as it is not material to an understanding of the opinion, it is not further noticed.

Upon the affidavits being filed in the court below, a motion was made by the plaintiff for judgment, and one by Gray, to be made defendant and allowed to plead.

His Honor granted the latter motion, and the plaintiff appealed.

Boyden, for the appellant.
Clement, *contra*.

BATTLE, J. The only inquiry which it is necessary for us to make in the present case is, whether a vendee who enters into the possession of a tract of land under a contract of purchase and afterwards fails to pay the price, can, in an action of ejectment by the vendor to recover the land, be treated as a tenant within the meaning of the act contained in the Revised Code, chap. 31, sec. 48. The counsel for the plaintiff contends that he can, and in support of his argument refers to the case of *Love* v. *Edmondston*, 23 N. C., 152, in which such a vendee was held to be a tenant at will to the vendor; and also to the Revised Code, chap. 63, sec. 2, in which it is declared "that one let into possession under a contract of purchase, which fails," shall be liable to the vendor in an action for the use and occupation of the land. In reply to this argument, the counsel for the defendant insists that the act, first above mentioned, which was originally passed in the year 1823, embraces in its language those tenants only who had leases for certain terms of years. and were holding over (490) after their terms had expired; that a vendee let into possession under a contract of purchase was not such a tenant, that, indeed, he was not strictly a tenant at will, but only an occupant holding for himself, and not bound or expected to pay any rent for the premises, liable however to be ejected in case he did not fulfill his contract by the payment of the price of the land; and that the last-mentioned act could not have the effect to convert him into a tenant, but only to render him responsible for the use and occupation of the land after he had failed to pay the purchase-money.

It is difficult, if not impossible, to resist the force of this reasoning. A vendee, who takes possession of a parcel of land under a contract of purchase, before he has paid the price and taken a conveyance of the title, certainly does not enter as the tenant of the vendor for any certain term of years. He does not stipulate for the payment of rent; on the contrary, he takes the profits of the land for his own use, being responsible to the vendor only for what remains unpaid of the price, with the interest accrued thereon. He does not therefore come either within the letter or the purview of the act in the forty-eighth section of the thirty-first chapter of the Revised Code; nor is he brought within by the second section of the sixty third chapter, concerning "Landlord and Tenant." The primary intention of this act is, as its preample shows, to enable a landlord to recover in an action of debt or on the case a reasonable satisfaction for the use and occupation of his land by a tenant, who had entered into possession under a parol agreement; and then the act, in the second place, declares "that one let into possession under a contract of purchase which fails, is within the meaning and purview of this section, and shall be liable for his use and occupation." The object of the latter part of the act is fully accomplished by compelling a faithless vendee, who has enjoyed the profits of land, for which he has not paid the purchase-money, to make compensation for his use and occupation. (491) It was never intended to convert him into a tenant holding under a certain term; that is, under a term for years, having a certain beginning and a certain ending. He therefore did not come within the letter or the spirit of the Revised Code, chap. 31, sec. 48, as contended for by the counsel for the plaintiff.

The judgment must be affirmed, and this opinion must be certified to the court below as the law directs.

PER CURIAM. Judgment affirmed.

THE STATE v. A. J. McCLURE.

One who was ordered into custody to secure the fine and costs in a criminal case, having escaped: *Held*, that it was competent for the Solicitor to have him again arrested that he might be compelled to undergo the sentence; and that the fact that the escape in question was voluntary did not alter the rule.

MOTION, heard before *Buxton, J.*, at Fall Term, 1867, of the Superior Court of Clay.

The defendant had been convicted of a misdemeanor, at Fall Term, 1867, and having been fined five cents, had been ordered into custody to secure the fine and costs. Subsequently, some difficulty having arisen as to his disposal, the sheriff let him go upon parole, to report in person from time to time, which he did so long as the sheriff remained in office. Afterwards he went entirely at large until arrested by order of the

Solicitor for the State (made during vacation), in order to compel him to pay the fine and costs.

The *capias* having been returned, the Solicitor (492) moved that he be committed; and, on the other hand, the counsel for the defendant, moved for his discharge.

His Honor, deeming the *capias* unauthorized, granted the latter motion, and the Solicitor appealed.

Attorney-General, for the State.

One escaping is always supposed to be in custody, and when actually present in court, it will proceed to judgment, or direct one formerly given to be carried out. 2 Hale, 407. He also cited 1 Hale, 565-6, and *State* v. *Cockerham*, 24 N. C., 204.

Merrimon, contra.

READE, J. The defendant could not discharge himself from suffering the judgment of the court by escaping from the custody of the sheriff, whether that escape was voluntary or involuntary on the part of the sheriff. Nor was he discharged by the consideration that the sheriff may have laid himself liable to pay the fine and costs. When it came to the knowledge of the court that the defendant had not suffered the judgment, it was proper to order process of arrest against him, and upon his appearance in court, to order the execution of its former judgment.

It was therefore error in his Honor to discharge the defendant under the idea that the process for his rearrest was unauthorized. If there had been no process at all, it would have been proper for the court to order him into custody (he being in court), and to order the execution of its judgment. *State* v. *Cockerham*, 24 N. C., 204.

There is error. Let this be certified, etc.

PER CURIAM. Order accordingly.

(493)

JOHN W. ISLER v. B. F. WHITFIELD.

1. The contingency involved in a limitation over upon the death of one "leaving no heirs of his body," can not be determined until the death has occurred; therefore,
2. Where one devised land to a grandson, providing that if he died without an heir of his body, it should go over to certain other grandsons and the survivors of them, and in case the last survivor of these died without heirs of his body, then over: *Held*, that the first taker and the grandsons together could not convey an indefeasible title in fee.

(*Winder v. Smith*, 47 N. C., 327, cited and approved.)

COVENANT, tried before *Warren, J.*, at Fall Term, 1867, of the Superior Court of Wayne.

The defendant had theretofore conveyed land to the plaintiff in fee, covenanting that he was seized in fee simple, and had the right to convey in fee with an indefeasible title. The action was brought for an alleged breach of these covenants.

The defendant claimed title under the will of Lewis Whitfield who had died in 1850 In this will the land in question was devised to the defendant with the following limitations: "And in the event of the death of the said Franklin Whitfield leaving no heir of his own body, then in that event the above-described lands and other property shall descend to the three sons of Lewis Whitfield, deceased, Hazard Whitfield, Cicero Whitfield and Lewis Whitfield, or the survivor of them. In case the last survivor of the sons of L. S. Whitfield, deceased, should die leaving no heir or heirs of his own body, the said lands or real estate shall be equally divided between all my grandchildren." After the death of the testator, Lewis Whitfield, named above as a devisee, died without issue, leaving Hazard and Cicero Whitfield his only heirs. (494) Thereupon they, before the conveyance by the defendant to the plaintiff, conveyed in fee to the defendant.

At the time of the testator's death, and also at that of the conveyance, there were other grandchildren than those above named; and of those above named Hazard alone has children.

Upon the above facts submitted to him as a case agreed, his Honor gave judgment *pro forma* for the defendant, and the plaintiff appealed.

No counsel for the appellant.
Strong, contra.

BATTLE, J. We are of opinion that the judgment rendered in the court below upon the case agreed is erroneous and must be reversed. The devise of the land in question to all the testator's grandchildren is an executory devise alternative to that to the testator's grandsons, Hazard Whitfield, Cicero Whitfield and Lewis Whitfield, or the survivor of them, both depending at present upon the death of the first devisee, B. Franklin Whitfield, "leaving no heirs of his own body." Until the defendant B. Franklin Whitfield shall die leaving no children or other descendants, it will necessarily remain uncertain whether the estate in the land will vest in the first or second class of devisees. It follows that the conveyance made by the defendant, though supported by the deeds made to him by Hazard and Cicero Whitfield, the survivors of the first class of executory devisees, can not transfer a title free from the claim of the testator's grandchildren, who compose the alternative class of executory devisees. See Fearne on Remainders, 373; *Winder* v. *Smith*, 47 N. C., 327.

Judgment reversed, and judgment for the plaintiff.

PER CURIAM. Judgment reversed.

(495)

JOSEPH B. STICKNEY v. THOMAS COX and another.

The Clerk of a County Court having transmitted to the Superior Court a case in which an appeal had been obtained by the plaintiff, no appeal bond being filed by inadvertence: *Held*, that upon such bond being filed in the Superior Court after a motion to dismiss for want thereof, it was probably competent for that court to refuse such motion—and that at all events, it was proper to grant an application for a *certiorari*, and then to place the case upon the trial docket.

(*McDowell v. Bradley*, 30 N. C., 92; *Robinson v. Bryan*, 34 N. C., 183; *Murray v. Shanklin*, 20 N. C., 276, cited and approved.)

CERTIORARI, before *Fowle, J.*, at Fall Term, 1867, of the Superior Court of Pitt.

The petitioner had brought an action of debt against the defendants, in the County Court. Having been nonsuited, he appealed; but from a misunderstanding upon that point by his attorney, no appeal bond was given. In the Superior Court the defendants moved to dismiss the appeal for want of a bond. Thereupon the plaintiff offered to file such bond, but the court declined to allow it, and dismissed the appeal.

The plaintiff then filed this petition, setting forth the facts upon which arose the misunderstanding that no appeal bond was required by defendants.

His Honor, having ordered the petition to be placed upon the argument docket, afterwards, upon consideration and hearing the evidence, ordered the case to be entered upon the trial docket. From this order the defendants appealed.

Bragg, for the appellant.
Fowle & Badger, *contra*.

BATTLE, J. We agree with his Honor in the court below that the cause ought to have been placed on the trial docket. We are inclined to think, upon the (496) authority of the cases of *McDowell* v. *Bradley*, 30 N. C., 92, and *Robinson* v. *Bryan*, 34 N. C., 183, that his Honor would have been warranted in allowing the plaintiff to file an appeal bond, in answer to the motion of the defendant to dismiss the appeal for the want of a bond. In both those cases the appeal bonds were so defective that new bonds had to be filed to sustain the appeal which the appellant had craved in the County Court and which he was desirous to prosecute. In the present case, though no bond was filed, yet the plaintiff had asked for an appeal, which had been granted, and he by no means intended to abandon it. The bond which he offered to give in the Superior Court fully met the purposes for which such a bond was required, to-wit, the effectual securing the appellee, and that substantially by the means prescribed in the statute. *McDowell* v. *Bradley, supra.* If this were so, then it is certain that, though his Honor thought it his duty to dismiss the appeal, he was fully justified in ordering a *certiorari*, and, upon its return, placing the case on the trial docket.

But, supposing that his Honor was bound in law to dismiss the appeal for the want of a bond, yet we think that the circumstances of the case authorized him to allow the case to be brought up to the Superior Court by the writ of *certiorari*, which in a proper case has always been used as a substitute for an appeal. *Murray* v. *Shanklin*, 20 N. C., 276.

The interlocutory order must be affirmed, and this opinion certified to the court below as in such cases the law directs.

PER CURIAM. Order affirmed.

(497)

Doe on dem. of ADAM BUTNER v. N. S. A. CHAFFIN.

1. It is well settled in this State that a vendee of land who enters upon it under a contract of purchase, is a mere occupant at the will of the vendor, and that the latter may at any time put an end to such occupancy by demanding possession under a reasonable notice to quit; and he may then recover in ejectment if possession be not surrendered. Twenty-five days notice to quit in such case is reasonable.
2. The state of the accounts between the parties in regard to the purchase-money does not affect the vendor's right to recover possession at law, although it might affect his choice of such a remedy rather than that of a bill for specific performance in equity.

(*Carson v. Baker*, 15 N. C., 220; *Love v. Edmundson*, 23 N. C., 152, cited and approved.)

EJECTMENT, tried before *Mitchell, J.*, at Fall Term, 1867, of the Superior Court of Forsyth.

The land in question was in the possession of the defendant, who had entered and still held under a contract of purchase from the lessor of the plaintiff. On the 23d day of February, 1867, the vendor had given the defendant notice to quit on the 20th day of March succeeding. The demise in the declaration was laid upon the 21st day of March, 1867, and the ouster upon the 22d.

It appeared that the vendee had paid to the vendor the larger part of the purchase-money.

A verdict having been found for the plaintiff, the defendant obtained a rule for a new trial, which having been discharged, there was judgment, and appeal.

W. L. Scott, for the appellant.
McLean and *Wilson*, *contra.*

READE, J. It must now be regarded as well settled in this State that when a person is let into the (498) possession of a tract of land under a contract of purchase, he is but a mere occupant at the will of the vendor, until the price shall be paid and the title passed. The vendor may put an end to this occupancy at any moment by demanding the possession under a reasonable notice to quit, and if it be not surrendered he may then maintain an action of ejectment. *Carson* v. *Baker*, 15 N. C., 220; *Love* v. *Edmonson*, 23 N. C., 153. In the latter case three weeks' notice to quit was deemed sufficient, and of course the time allowed for the defendant in the present case, which was more than three weeks, must be held to be long enough. In *Carson* v. *Baker*, the demise contained in the declaration was laid on the day on which the defendant was required to quit, which was decided to be too soon, and in consequence thereof the action failed, but that objection can not be made in the case before us, because the demise is laid the day after the determination of the notice to quit.

The payment by the vendee of the greater part of the purchase-money can not make any difference so far as the right of the lessor of the plaintiff to recover in ejectment is concerned; but if the vendee should afterwards file a bill in equity for a specific performance, he will not only be allowed a credit for his payments, but also be entitled to an account of the profits of the land made by the vendor after he shall have recovered possession.

In this state of the law it will be a matter for the consideration of an unpaid vendor whether it will not be best for him to file a bill against his defaulting vendee for a specific performance rather than recover back the possession of his land in an action at law. That, however, can not affect the result in the present case. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: *Guess* v. *McCauley*, *post*, 516; *Hemphill* v. *Giles*, 66 N. C., 514; *Mitchell* v. *Wood*, 70 N. C., 299; *Jones* v. *Boyd*, 80 N. C., 262; *Isler* v. *Koonce*, 81 N. C., 382; *Allen* v. *Taylor*, 96 N. C., 39.

(499)

BUCKNER B. LINK v. JOHN BROOKS.

The record of an order made in a County Court for laying out a cartway recited—"seven justice being present,"—without giving their names: *Held*, that such record was fatally defective, and the order void.

(*State v. King*, 27 N. C., 203, and *Foster v. Deans*, 11 N. C., 299; cited and approved.)

PETITION for a cartway, heard before *Gilliam, J.*, at Spring Term, 1866, of the Superir Court of Person.

No statement of facts is required beyond what appears in the opinion.

In the court below, the appeal from the County Court having been dismissed, and a *procedendo* awarded, the defendant appealed to this court.

Graham, for the appellant.
Moore and *Edwards*, *contra*.

BATTLE, J. This was a petition for a cartway filed in the County Court, under sec. 37 of chap. 101 of the Rev. Code. To constitute a court having jurisdiction to grant the prayer of such a petition, it is essential that seven justices shall be present, as is expressly required by the act. The transcript of what purports to be the record of the County Court, when the order for the laying out of the cartway in the present case was made, recites "seven justices being present," but does not set out their names, and the defendant's counsel objects that it is fatally defective on that account. The ground of the objection is that it does not appear that there was any court having jurisdiction of the subject-matter, and that consequently the order for the cartway was null and void.

(500) Upon an examination of the authorities, we find that the objection is fully sustained by them. As early as the time of Queen Elizabeth we find that a presentment in the Quarter Sessions was quashed upon *certiorari*, because it did not state the justices before whom it was taken. *Ludlow's case*, Cro. Eliz., 738. At

a later period, the same doctrine was held in the *King* v. *Vaws*, 1 Mod., 24, and Sergeant Hawkins, in his pleas of the Crown, says that it seems generally agreed that if the caption of an indictment, at the sessions of the peace, do not mention before whom it was holden, or if it be set forth generally as holden before justices of the peace, without naming them, it is insufficient. Haw. Pl. Cr., b. 2, chap. 25, sec. 125. The rule has been adopted in this State, and is applicable to civil as well as criminal cases. See *State* v. *King*, 27 N. C., 203. The reason for the rule, as given in that case, is "that it must appear that there were three justices in order that we may see that the record was really made up under the authority of those who were competent to make it, or have it made. It is arguing in a circle when it is said there were three justices, because the record says it is the record of the court, for it must first be seen who made the record, before we can tell whether it be the record of the court or not." What is thus said of the necessity of naming the three justices, who are competent to hold a court of Pleas and Quarter Sessions while sitting for the dispatch of ordinary business, will apply with equal force to a court consisting of a larger number, when such number is required on special occasions. *Foster* v. *Deans*, 11 N. C., 299. But it is objected that in certain cases, as for instance when a guardian bond is taken, it is expressly required by statute that the names of the justices, who may be present holding the court, must be recorded—(see Rev. Code, chap. 54, sec. 6)—and it is argued from this that they need not be named on ordinary occasions. The reply to this (501) objection is that when the County Court meets, with three or more named justices on the bench, they, or a sufficient number of the other justices of the county, are presumed to be continually present holding the court until the end of the term. See the cases of the *State* v. *King* and *Foster* v. *Deans*, above referred to. In the last-named case, it is said that "It is impossible to shut our eyes to the fact that, though the court may be in session throughout the day, the individuals composing it are continually changing, and, of these changes, no memorial is made by the clerk. Sometimes three justices are collected for the purpose of opening the court, which, when they have done, they yield their places to others, whose stay there may also be brief, and the physical identity of the court change with every passing hour,

> ———*ut unda impellitur unda.*
> *Tempora sic fugiunt pariter, pariterque sequuntur.*"

Hence it is manifest that when the justices who take an insufficient guardian bond, are to be rendered liable, as they are by the second section of the act to which reference has been made, the names of those present and taking such bond must necessarily be recorded.

It is a matter of regret that the case as now presented to us must be decided, not upon its merits, but upon the insufficiency of a record, which the clerk of the County Court ought to have made perfect by inserting the names of the seven justices who were present when the order in question was granted. There can not for the future be any excuse for a similar mistake, as Mr. Eaton's excellent book of Forms gives, at page 626, a well drawn form for the transcript of a record of the County Court, and, at page 629, one for that of the Superior Court.

The judgment of the Superior Court must be reversed, (502) and this opinion must be certified to that court to the end that the petition may be dismissed.

PER CURIAM. Ordered accordingly.

Doe on dem. of WILLIAM G. HALL *et al.* v. EDWIN WANT.

1. A demise of land to the testator's son and daughter for life, "and then to go to my [testator's] heirs-at-law, and their heirs and assigns forever, excluding all those on the part of my [testator's] sister Brooks:" *Held*, to pass a contingent remainder to the persons described as "heirs," at law, as they could be ascertained only after the termination of the particular estate:
2. *Held, also*, that a partition *in fee* under order of court, made between the son and daughter (at that time the testator's only heirs), was no ground for an estoppel to the children of the daughter, who, upon the death of the son without issue, their mother having died before, claimed the land under the devise:
3. *Also*, that a bargain and sale *in fee* by the son, of the part allotted to him under the partition, was without effect upon the remainder.

EJECTMENT, tried at Spring Term, 1867, of the Superior Court of Craven, before *Mitchell, J.*

The lessors of the plaintiff were the only issue of one Wm. Good, who survived at the death of his son, John Rumsey Good, and were then also the only issue of the testator's deceased daughter, Mary Hall.

By his will, proved at December Term, 1820, of Craven County Court, William Good devised the land is question to his "son, John Rumsey Good, and his wife, Clarissa, for and during both their lives, and then to go to my heirs-at-law, to them and their heirs and assigns forever, excluding all those on the part of my sister, Brooks." (503) The other half of his land he devised to his daughter, Mary Hall, for life, with the same final disposition as above.

At March Term, 1821, of the County Court of Craven, after the usual proceedings under a petition by John Rumsey Good and his sister, Mary Hall, alleging that they were seized in fee, a decree was made for the partition between them of the lands as devised above, and the land in question was allotted to the former. In January, 1824, he conveyed his share to Beavers & Brame in fee, and by other conveyances it came to the defendant as lessee of one Jones.

John Rumsey Good died without issue in March, 1859. This action was begun in March, 1861, by the lessors of the plaintiff, claiming title under the above devise as heirs of the testator, and was submitted to his Honor upon a case agreed. Judgment having been given for the defendant, the plaintiff appealed.

No counsel for the appellant.
Hubbard, *contra*.

BATTLE, J. As Mrs. Clarissa Good, the wife of the devisee, John Rumsey Good, died in the lifetime of the testator, the devise was in effect to her husband for life, and then to the testator's heirs-at-law and their heirs, excluding all those on the part of his sister, Brooks. It will be noticed that the limitation is not to the heirs of the devisee, so that he could not take a fee under the operation of the rule in Shelly's case. What construction, then, can be put upon the words limiting the estate to the testator's own heirs and their heirs, after the death of the tenant for life? The only meaning which, as it seems to us can be attributed to them, is that they create a contingent remainder in favor of the testator's heirs at-law dependent upon the estate for life in John Rumsey Good, as a particular estate. Who were to be such heirs would not of course be ascertained until the determination of the particular estate for life. (504) The lessors of the plaintiff were, as events have turned out, the heirs-at-law at that time, and were entitled to recover the land unless, in the meantime, something was done by which their claim was barred.

Two things are suggested which it is contended may have had that effect: The first is the partition of the land of the testator between his son and daughter claiming it as tenants in common in fee, a devise of an undivided half having been made to the daughter in terms the same as those in the devise to the son. The second is the conveyance by the son of his part of the land in fee. Neither of these things can have the effect contended for. The heirs-at law of the daughter can not be estopped by the partition made between their mother and uncle, because they do not claim their uncle's share of the land as her heirs, but as the heirs of the testator, their grandfather; so that, as to the partition, they were neither parties nor privies.

The second matter is the conveyance in fee by the tenant for life. If that conveyance had the effect to destroy the particular estate for life, it would be a necessary consequence that the contingent remainder to the testator's heirs would be defeated. The conveyance is stated to have been by deed, by which we must understand that it was by an ordinary deed of bargain and sale; and the operation of such a deed, it is well known, will not pass to the bargainee any greater interest than the bargainor may rightfully convey. It can not, therefore, although it purports to pass the fee, destroy the life estate, but will only transfer it to the bargainee, and thus preserve the contingent remainder dependent upon it.

It being thus seen that nothing had occurred (505) to bar the claim of the lessors of the plaintiff, it follows that the judgment rendered against them in the court below was erroneous and must be reversed, and a judgment be entered for them in this court upon the case agreed.

PER CURIAM. Judgment reversed, and judgment here for the plaintiff.

TIMOTHY KEELER v. CITY OF NEW BERN.

1. No evidence is required of facts admitted in a cause.
2. The charter of a town requiring the officers to be elected, persons can not claim to be *de facto* officers of that town who have never been elected, but they are mere usurpers, and the corporation is not liable for contracts made by them in the name of the town.

ASSUMPSIT, tried before *Shipp, J.*, at Fall Term, 1867, of the Superior Court of Craven.

The plaintiff declared upon a special contract for his wages as a policeman in the city of New Bern for a part of the year 1865, at the rate of $75 per month. The defendant relied upon the plea of general issue. The plaintiff offered proof that certain persons were exercising the functions of Mayor and Councilmen of the city of New Bern in July, 1865, and that as such they employed him to serve as a policeman from that time to January, 1866. The plaintiff produced no charter or act of incorporation of the city, nor did he produce any evidence of the manner in which the said persons were inducted into office; but it was shown that they took possession of the offices in July, 1865, and continued to act as incumbents until March following without interruption. (506) It was proved that they had not been elected, and had never held office in any previous year; and it was admitted that the charter and the laws by which the city was governed required an election of the Mayor and Councilmen.

The defendant contended: 1st. That the plaintiff was bound to show that there was such a corporation as the city of New Bern, and that this could be done only by producing the act of incorporation. 2d. That the persons acting as Mayor and Councilmen at the time of the contract with the plaintiff were mere intruders or usurpers, and had no authority to contract debts binding upon the city.

By agreement, these questions were reserved, and a verdict was entered for the plaintiff, subject to the opinion of his Honor. The court being of opinion with the defendant set the verdict aside and ordered a nonsuit. The plaintiff appealed.

No counsel for the appellant.
Manly and *Haughton*, *contra*.

Corporate capacity must be expressly shown. 1 John. Dig., 416, sec. 1; 10 N. C., 520.

The acts of persons who usurp office are void. Ang. & Am. Cor., 159. As to officers *de facto*, see *Ibid.*, pages 140-4, 361.

READE, J. There seems to be no force in the defendant's first exception: that the existence of the corporation could only be shown by the act of incorporation; because "it was admitted that the city was incorporated, and that the charter and laws required the Mayor and Commissioners to be elected." This admission dispensed with the production of the charter.

The second exception: that the persons with (507) whom the defendant contracted were never elected to office, and never installed into office, and were mere intruders—is well taken. There are many cases where the acts of *de facto* officers acting under color of authority are valid, and, in such cases, their regular induction into office is presumed; but certainly there can be no such presumption in this case against the admitted fact that they had never held office before, and were never elected to office, and that the charter requires an election. Against these admissions there can be no presumption, and therefore it follows that they were mere intruders or usurpers, and had no authority to bind the city.

There is no error. Let this be certified, etc.

PER CURIAM. Judgment affirmed

Cited: Norfleet v. *Staton*, 73 N. C., 550; *Van Amringe* v. *Taylor*, 108 N. C., 201.

(508)

STATE v. JOHN TAYLOR and JIM KNIGHT.

1. It is no ground to quash an indictment, that it was found by a grand jury drawn from a venire in which there were no colored freeholders—the jury list, as constituted by the County Court in accordance with the law in force at the time of its constitution, not containing the names of such colored freeholders.
2. It is no ground of exception that a special *venire* was selected from the freeholders of the county without regard to color, no reference having been had to the jury list constituted by the County Court.
3. A freed woman is a competent witness against a freed man who claimed her as his wife while they were slaves, but since their emancipation has refused to marry her.
4. After the testimony for the State is closed and before witnesses for the prisoner are introduced, his counsel has no right, in stating the grounds of defence, to comment at length upon the evidence for the State.
5. Evidence that a prisoner, after being committed to jail, had opportunity to escape and did not avail himself of it, is not admissible.
6. The examination of a witness taken before a jury of inquest or an examining magistrate, is inadmissible as evidence in chief, unless it be shown that the witness is dead.
7. In a case of murder, the deceased being a merchant and the evidence against the prisoner being circumstantial, an account book showing entries by the deceased just before the murder was held admissible as evidence tending to connect the prisoner with the transaction.

(*State v. Owen, ante, p.* 425; *State v. Samuel,* 19 N. C., 177; *State v. David*, 49 N. C., 353; *State v. McLeod,* 8 N. C., 344; *State v. Valentine*, 29 N. C., 225; and *State v. Arthur,* 13 N. C., 217, cited and approved.)

MURDER, tried before *Fowle, J.*, at Fall Term, 1867, of the Superior Court of Edgecombe.

The prisoners, colored men, were indicted for the murder of one John A Cutchin in the month of August, 1866.

1. The bill was found at Fall Term, 1866, by a grand jury drawn from a *venire* summoned according to the course of the court at that time. The jury list (509) from which the *venire* was selected did not contain the names of any colored freeholders, no jury list containing such freeholders having at that time

been constituted by the County Court. The counsel for the prisoners moved to quash. The motion was overruled, and the prisoners excepted.

2. The original panel having been drawn in the same way as the grand jury, the prisoners challenged the array. The State, without admitting the cause of challenge, consented to set aside the panel. The special *venire* was composed of one hundred freeholders, summoned under the order of the court, "without regard to color," and consisted of freeholders of both colors. The prisoners challenged the array, because "they were not summoned from a list constituted by the County Court from freeholders without distinction of color and who, in the judgment of the County Court, were qualified to act." The challenge was disallowed, and the prisoners excepted.

3. On the trial one Lydia Taylor was offered as a witness for the State. The prisoners' counsel objected to her being examined, on the ground that she was the wife of one of the prisoners. Touching her competency it was in proof that some eight or ten years before she and the prisoner, John Taylor, while slaves, had lived together as husband and wife. John Taylor was then sold, and did not again live with Lydia until December, 1865, when he took her to his home and they cohabited together. She requested him to marry her, but he refused to do so. The court admitted the witness The prisoners excepted.

4. After the State closed its case the counsel for the prisoners, before offering evidence, proceeded to state their grounds of defence, and in doing so commenced a minute criticism of the evidence of the State, and to argue the case at length. Upon objection by the (510) Attorney-General, the court ruled them to a statement of the character of the evidence they expected to introduce, adding that the rule was that "when the State has the right to the conclusion, it also has the right to open the argument." The prisoners excepted.

5. The prisoners offered to show that since they were confined in jail they had had several opportunities to escape; that the jail had been broken open in the night-

time and they might easily have escaped, but they did not avail themselves of the opportunities. The court ruled the evidence out as irrelevant. The prisoners again excepted.

6. The prisoners then offered in evidence the examination of one Henry Wheeler, taken before the jury of inquest and committing magistrate, as follows: "I went to Mr. John A. Taylor with King and staid there an hour and a half or more. Then went to the widow Turner's and remained there till past midnight, playing with George. George owed me some money. Then went to Buck Etheridge's. While at Mrs. Turner's saw four men pass, who asked me to go with them to Whitaker's station for the dry goods. I told them I had no money, and they said that made no difference. I refused to go. One of them was Peter Powell. I saw the four men at a late hour returning from the direction of Whitaker's and one of them had a long white bag on his back, apparently filled with something."

It appeared that Henry Wheeler was in the county until January 1, 1867, and was under *subpœna*, but was absent at the trial, "no one knew where." The Attorney-General objected that his examination was irrelevant, but if relevant was incompetent. The court sustained the objection and the prisoners excepted.

7. The evidence against the prisoners was circumstantial. The deceased was a merchant and was killed in the nighttime at his store-house by a blow on the head with a hammer, which broke his skull, and (511) from which he soon died. The counsel for the prisoners offered evidence to show that the murder was probably committed by a colored man named Scipio; that on the night of the murder Scipio said that he was going to the store to buy some tobacco, etc., and walked off in that direction. The State offered to show, in reply, that it was the habit of the deceased to enter the transactions of the day in an account book, and that this book was found on the counter when the murder was discovered, and was in the same condition at the trial as when so found It was also in evidence that early in the morning of the day of the homicide, the

prisoner, Taylor, went to the store, left some watermelons, and bought sugar and flour, and said he would call for the melons and pay for the sugar and flour; that Taylor had said that while in the store one Finch came in and bought some small articles, and offered a $2 bill in payment; that deceased could not make the change and he, Taylor, loaned the deceased the required change. The State then offered the account book in evidence, to show that Scipio had in fact bought the articles mentioned by him; that Finch had traded to the exact amount of $2 and paid for his purchases; that, though there were several entries after these, there was no entry of the trading with Taylor; and that all the entries were in the handwriting of the deceased. The prisoners objected to the admission of the book; but it was admitted by the court, and the prisoners excepted.

Verdict, Guilty. Rule for a new trial discharged. Judgment, and appeal.

No counsel for the appellants.
Attorney-General, *contra*.

BATTLE, J. In the bill of exceptions filed by (512) the prisoners several errors are assigned, which we will proceed to consider in the order in which they appear:

1. The first is founded upon a motion made in the court below to quash the indictment, because it had been found by a grand jury drawn from a *venire* in which there were no colored freeholders. His Honor refused the motion, because the jury list from which the *venire* was selected did not have upon it the names of any colored freeholders, the County Court not having constituted a jury list containing the names of such colored freeholders at that time. We think the motion was properly overruled The jury list was constituted, and the *venire* drawn from it, in accordance with the law as it then stood, and therefore no just exception could be made to it. See Rev. Code, chap. 31, sec. 25.

2. The second exception relates to the manner in

which the traverse jury was formed, and is settled against the prisoners by our decision in the case of the *State* v. *Owen*, *ante*, 425.

3. The third exception is founded upon the admission of Lydia Taylor as a witness for the prosecution. The allegation that she was the wife of the prisoner, John Taylor, was clearly disproved by the testimony. While the parties were slaves she could not be recognized as the legal wife of the prisoner, Taylor, and after they were emancipated he refused to marry her. She was in law nothing more than his concubine, and as such was a competent witness against him. *State* v. *Samuel*, 19 N. C., 177.

4. The question of practice involved in the fourth exception was settled in the case of the *State* v. *David*, 49 N. C., 353, and nothing more need be said about it.

5. The fifth exception is, for the rejection of the evidence that the prisoners had one or more opportunities to escape from jail and did not avail themselves of them. The argument in favor of the exception is, that (513) as the flight of an alleged criminal is admissible as evidence against him, his refusal to fly in the first instance, and his declining to escape after having been committed to jail, ought to be admitted as evidence in his favor. The argument is plausible, but it has been settled to the contrary upon the ground that it would be permitting prisoners to make evidence for themselves by their subsequent acts. See *People* v. *Rathbun*, 21 Wend., 509; *Campbell* v. *State*, 23 Ala. R , 44; Whar. Am. Cr. Law, sec. 714.

6. The rejection of the examination of the witness, Henry Wheeler, taken before the jury of inquest and examining magistrate, forms the sixth exception. The objection to the evidence was put upon two grounds, first, that the testimony was irrelevant, and, secondly, that it was not shown by the prisoners that Wheeler was dead, or what had become of him. His Honor rejected the evidence without stating his reasons for it. We are inclined to think that either ground of objection was sufficient, and we are entirely satisfied that the last

was. The examination was, so far as we can see, offered as evidence in chief, and for that it was inadmissible without proof that the witness was then dead. *State* v. *McLeod*, 8 N. C , 344; *State* v. *Valentine*, 29 N. C., 225.

7. The seventh and last exception is based upon the reception in evidence of the deceased's book of accounts for the purpose of showing the last entries which he had made just before he was killed. The case depended entirely upon circumstantial testimony, and we think the book was clearly admissible for the purpose of showing one of the links in the chain of evidence. It was not only evidence but very material evidence, tending to connect the prisoner, John Taylor, with the transaction. It was one of those circumstances surrounding homicide, which though apparently trifling in itself, often connects with other circumstances, and leads to the detection of the perpetrator, and so has given rise
(514) to the short but awfully impressive maxim that
"murder will out." *State* v. *Arthur*, 13 N. C., 217.

It must be certified to the Superior Court of Law for the county of Edgecombe that there is no error in the record, to the end that the court may proceed to pronounce the sentence of the law upon the prisoner.

PER CURIAM. There is no error.

Cited: State v. *Grady*, 83 N. C., 646; *State* v. *Behrman*, 114 N. C., 804.

Doe on dem. of JOSIAH GUESS v. WILLIAM McCAULEY.

1. An action of ejectment can not be maintained upon a demise made on a day before the plaintiff's right of entry begins; therefore, not by a vendor against his vendee (who has failed to comply with the terms of the contract), upon a demise made on a day before the demand of possession.
2. It seems that one day's notice to leave is not sufficient to maintain ejectment in such case.

(*Love v. Edmondson*, 23 N. C., 152; *Butner v. Chaffin*, *ante*, 497, and *Carson v. Baker*, 15 N. C., 320; cited and approved.)

EJECTMENT, tried before *Mitchell*, *J.*, at Fall Term, 1867, of the Superior Court of Orange.

The lessor had contracted to sell the land to the wife of the defendant, and they had entered under such purchase. Subsequently they failed to make payment as agreed, and upon the 28th of August, 1866, possession or the money was demanded of them. To this the defendant replied, Sue me and I will pay you one-fifth; that is all you can get. On the next day this suit was begun. The demise was laid upon the 1st day of August, 1866.

(515) In obedience to an intimation of his Honor's opinion in the court below, the plaintiff submitted to a nonsuit, and appealed.

Graham, for the appellant.

1. A purchaser let into possession is not a tenant, but merely an occupant. *Jones* v. *Taylor*, 12 N. C., 434; at most he is a tenant at will strictly, and so may be turned out at any time. 2 Bl. Com., 145-6, Sharswood's n., 10; *Foust* v. *Trice*, 53 N. C., 490.

2. In all cases where the six months' notice is not required, reasonable notice means time for the tenant to take his goods and depart. *Jones* v. *Willis*, 53 N. C., 430. The speed with which persons in the case of Guess can take possession, is recognized in the doctrine that they are not entitled to receivers. Adams' Eq., 122; 1 Jac. & Walk., 176-627.

3. Here defendant waived right to notice, defying the vendor by reference to the stay law. *Jones* v. *Willis*, *supra.*

Phillips & Battle, contra.

1. The notice was not sufficient. *Love* v. *Edmonston*, 23 N. C., 152; Leigh's N. P., 862; *Lewis* v. *Beard*, 13 E., 210.

1. The notice was defective as being in the alternative. *Doe* v. *Jackson*, Doug., 176; Adams on Eject., 164; *Roberts* v. *Haywood*, 14 Eng. C. L., 381.

BATTLE, J. It is admitted that upon the facts stated in the plaintiff's bill of exceptions, his lessor had a right to demand the surrender of the possession of the land mentioned in the declaration, and that, upon the refusal of the defendants to comply with the demand, he (516) might sustain an action of ejectment against them. The only disputed question, which has been brought to our attention in the argument, is whether one day's notice to leave the possession is sufficient, and we are inclined to the opinion that it is not. We think that the occupier ought to have at least time enough to look out for another house and remove to it. It is difficult to say what precise number of days shall be allowed for the purpose, and we will not undertake to decide the question until a case shall arise to call for it. We may take it to be settled that three weeks is long enough because it was so held in *Love* v. *Edmondson*, 23 N. C., 152, and again in *Butner* v. *Chaffin*, *ante*, 497; but as the present case must be decided against the plaintiff upon another ground, we shall decline the attempt to determine what time short of three weeks will be upheld as sufficient.

The ground upon which this case must turn is, that the demise in the declaration is stated to have been made on the 1st day of August, 1866, which was twenty-seven days before the possession of the land was demanded of the defendants by the lessor of the plaintiff.

In such case the action can not be sustained, as is clearly shown by the case of *Carson* v. *Baker*, 15 N. C., 220, where the subject is fully discussed and explained, and the cases of *Right* v. *Read*, 13 East., 210; *Birch* v. *Wright*, 1 Term Rep., 383; and *Den* v. *Rawlings*, 10 East., 267, are cited and relied upon in support of it.

The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

(517)

THOMAS ROSE v. DAVID COBLE and HENRY MOORE.

1. A purpose to defraud creditors on the part of the pledgor not participated in by the pledgee, does not affect the pledge.
2. Although for the validity of a pledge it is necessary that possession shall be given to the pledgee and not be resumed by the pledgor—this rule does not embrace a case where the pledge is re-delivered to the pledgor as an agent of the pledgee.
3. The rule that *tort feasors* can not dispute the title of him from whose possession they took the thing in dispute, does not apply where they are sued by such person in *trover*.

TROVER, tried at a Special Term of the Superior Court of Guilford, held upon the second Monday in December, 1867, before *Warren, J.*

The plaintiff claimed a special property in the mare in question, under a pledge by one Garner, his brother-in-law, dated 13th October, 1866, made to secure him as his creditor and also as his surety. She had been delivered to the plaintiff, and was in his possession when taken by the defendants, who were constables having claims in their hands against Garner. It was shown that after the plaintiff had taken possession of the mare, Garner again had her in his possession and offered her for sale at Greensboro; but he and Rose both swore that he did this as the agent of Rose, and that the proceeds of the sale, if effected, were to have been applied to the debt due to the latter. There was evidence also that Garner was much in debt, and was seeking to elude certain creditors.

His Honor charged the jury (1) that any fraudulent purpose of Garner to which Rose was not a party would not affect the latter; but if there was an arrangement between them to defraud Garner's creditors, the (518) plaintiff could not recover; (2) that if Rose had received the mare *bona fide* as a pledge for debts, its subsequent temporary possession by Garner, if this were as agent of Rose, would not affect the plaintiff's right to recover; but if Garner's possession were for himself, that was inconsistent with the idea of a pledge, and in such case the plaintiff could not recover.

Verdict for the plaintiff. Rule for new trial discharged. Judgment, and appeal.

McLean, *Dick* and *Gorrell*, for the appellants, upon the point that the title of the plaintiff was in question in the form of action employed by him, cited *Hostler* v. *Scull*, 3 N. C., 129; *Laspeyre* v. *McFarland*, 4 N. C., 620.

Scott & Scott, contra.

As regards the first point made by his Honor, the question of title did not arise, as defendants were tort feasors. *Worth* v. *Northam*, 26 N. C., 102. The ruling, however, was correct. See *Stone* v. *Marshall*, 52 N. C., 300.

To support the second point in the charge, they cited Story, Bail., sec. 299; 2 Kent, 745, note (2); *Macomber* v. *Parker*, 14 Pick., 497, etc.; *Bodenhammer* v. *Newsom*, 50 N. C., 107; *Reeves* v. *Capper*, 4 Bing. N. C., 54; 2 Taunt., 268.

READE, J. The defendant's first objection is, "that the transaction was fraudulent." Whether there was fraud or not was a question of fact for the jury, under proper instructions from the court. That part of the charge which was excepted to is, "that any fraudulent purpose on the part of the pledgor, to which the pledgee was not a party, did not affect the pledge." We see no error in this. To render a contract void for fraud, the fraud must affect the contract. A contract is not (519) the purpose of one but the agreement of two minds.

The defendant's second exception can not be sustained. It is true that to the validity of a pledge it is necessary that there should be a delivery to the pledgee, and that his possession should continue, and that the pledge is lost by giving the pledgor the control of it. But the fact that the pledgee authorized the pledgor, as his agent, to take the mare to Greensboro to try to sell her to raise money to pay the debt for which she was pledged, does not contravene that rule, because the possession of the agent was the possession of the principal.

It was insisted for the plaintiff in this court that the defendants were *tort feasors*, and therefore could not question his title. That would be true if this were an action of trespass; but it is not true in an action of trover, which involves the title and in which it is alleged that the defendants found and converted his property. But the other points being for the plaintiff, this is not material.

There is no error.

PER CURIAM. Judgment affirmed.

Cited: Lassiter v. *Davis*, 64 N. C., 500; *Bruff* v. *Stern*, 81 N. C., 189; *Trust Co.* v. *Forbes*, 120 N. C., 358.

(520)

THE STATE v. F. D. SCHLACHTER and LOUISA WITLE.

1. Where a marriage has been solemnized according to the laws of another one of the United States, between persons free to marry according to such laws, and the parties afterwards for several years conduct themselves as husband and wife, having children, etc., it seems that an indictment for fornication and adultery is not the proper method of testing the validity of such marriage.
2. A couple domiciled in New York intermarried there in 1856, and subsequently (before 1861) removed to North Carolina; in January, 1864, the wife removed again to New York, in December, 1864, obtained a divorce, and in January, 1866, re-married (both acts being in accordance with the laws of New York); afterwards she returned to North Carolina with her second husband, and they lived together as man and wife: *Held*, that there is nothing in the doctrines of *Irby v. Wilson*, 21 N. C., 568, to impeach such divorce and second marriage, and that it seems that that marriage, being in accordance with the laws of the State where it was solemnized, can not be impeached in the courts of another State.

(*Irby v. Wilson, supra*, cited and remarked upon.)

FORNICATION AND ADULTERY, tried upon a case agreed, before *Green, J.*, at September Term, 1867, of the Criminal Court of Craven.

In 1856 the feme-defendant was duly married to one Argos Witle, in New York, and with her husband subsequently removed to North Carolina. They lived together until January, 1861, when he entered the military service of the Confederate States, and went to Virginia. In 1863 he deserted that service and returned to Newbern, but did not cohabit with his wife. In January, 1864, she "moved" to the State of New York, and subsequently filed a petition for divorce there, alleging as ground for it the adultery of her husband. He was then in the military service of the United States at Newbern, and was brought into court in the divorce proceedings, by publication according to the laws (521) of New York. On the 23d of December, 1864, a decree for divorce was given, and on the 9th day of January, 1865, she, in due form, remarried with the other defendant, in New York. Since then they have lived together, having two children, etc., in Newbern, North Carolina.

Upon these facts, his Honor was of opinion that the defendants were guilty, and fined each of them ten dollars.

The defendants thereupon appealed.

Manly & Haughton, and *Hughes*, for the appellants.

The domicil of the wife is not that of the husband where it is necessary to assert an adversary interest. Story Confl., 229, a note 2; *Irby* v. *Wilson*, 21 N. C., 581; *Schonwald* v. *Schonwald*, 55 N. C , 369.

Here the feme's domicil, in December, 1864, and January, 1865, was in New York; therefore she and her marital relations were subject to the laws of that State. Story Confl., sec. 89; 3 John., chap. 210; 2 Bish. Mar. and Div., 115.

The marriage, being valid by the *lex loci*, is valid everywhere. Story Confl , secs. 80 and 80a, 113 and notes, and 121–123 b; *West Cambridge* v. *Lexington*, 1 Pick., 596; Fergus. Mar. and Div., 269, n R; 1 Bish. M. & D., 333.

If Schlachter thought the feme-defendant was his wife, he committed no crime. 2 Bish. Cr. L., secs. 22 and 23; 2 Black., 318; 1 Bish. Cr. L., secs. 367–371, 378, 383.

Attorney-General, *contra*.

In an indictment involving the validity of a marriage, the decree of a foreign court may be collaterally impeached. Story Confl., secs. 217, 218; *State* v. *Patterson*, 24 N. C., 356; Duchess of Kingston's case, 11 State Trials, 262.

(522) Upon the other points in the case he cited *Irby* v. *Wilson*, *supra*, as confirmed, 7 Watts, 349, and 15 Johns., 131; 2 Kent, 96, 106–108, 228, 344; Story Confl., pages 196, 198, 327, 343, etc.; Bish. M. & D., 121–3.

PEARSON, C. J. To support the ruling of his Honor in the court below, it was necessary for the Attorney-General to maintain the position that the decree of the Superior Court of the State of New York, by which the defendant, Louisa, was divorced from her former husband, Argos Witle, can be treated by the courts of this State as a proceeding void and of no effect not only so far as the rights and liabilities of the said Louisa and Argos Witle are concerned, but also as against the other defendant, Schlachter; because, in an indictment for fornication and adultery, both of the parties must be guilty, or the offence is not proved. In other words, this court must decide that the decree of the Superior Court of the State of New York is a nullity, in order to support the judgment appealed from.

Irby v. *Wilson*, 21 N. C., 568, is relied on by the Attorney-General to maintain this position. The ruling in that case has been objected to, on the ground that, if the guilty party by a change of domicil can render personal service of process impossible, and there is no way by which personal service can be dispensed with, as by a return of "*non est inventus*" to the process followed by advertisement in the newspapers or otherwise, the effect would be to take from the party injured all means of redress.

To this may be added another objection. Mrs. Jones *alias* Mrs. Irby was not by the action of the court considered as estopped, that is, as having "her mouth shut"; but was allowed to allege, in the face of a solemn deed executed in due form of law, to-wit, ceremony of marriage, that she was guilty of a capital felony—bigamy, for which, according to the ruling in the case, she ought to have been hung.

(523) We are not, however, called upon to discuss the objections which have been made to that decision; for our case does not come within the application of the decision, supposing it to fix the law. The facts are different in several material particulars.

In that case the first marriage was in the State of South Carolina, where by law the marriage relation was indissoluble; the divorce was in the State of Tennessee, according to the laws of that State, and the case was decided in the State of North Carolina.

In our case, the first marriage was in the State of New York, where by law the marriage relation may be dissolved by divorce and a decree of divorce may be declared, although personal service of process be not made; after due advertisement a decree of divorce was duly rendered in the State of New York, in accordance with the laws of that State. The second marriage was duly solemnized in the State of New York. So, instead of a marriage in one State, where divorce is not allowed, and a divorce in another State, and the second marriage called in question in a third State, we have a marriage, a divorce and a second marriage, all, effected in the same State, and, in conformity to the laws of that State.

The concession made in the opinion delivered in *Irby* v. *Wilson* covers our case, and relieves us from the necessity of making an issue. It is therein conceded that the divorce was valid in the State in which it was made; but it was ruled that the divorce was a nullity in every other State.

Assume, as is done in *Irby* v. *Wilson*, that the divorce was valid in the State of New York, it follows that the second marriage was valid in the State of New York, being solemnized in the manner required by the laws of that State; and it further follows, as it seems to us, that its validity can not be drawn in question by the courts of any other State.

When the case was called, the idea of trying (524) the validity of a marriage upon an indictment for fornication and adultery, struck us as novel. We are not called on to decide the point, but we must be permitted to say that when there has been a marriage between the parties solemnized in the manner required by the laws of a sister State, we should be slow to allow it to be impeached in this collateral manner, for the result of the indictment establishes nothing. The marriage is not decreed to be of no force or effect; the parties are not relieved from the bonds of matrimony, or allowed to live separately as if divorced from bed and board; and, in regard to the status of the children, nothing is decided; and the amount of it is, that the parties are admonished by a fine of ten dollars each, to take such proceedings as may be necessary and proper to establish their marriage or else have it declared void by a decree of nullity of marriage.

This proceeding will do very well when the marriage is a mere sham, and the parties are merely pretending to be "husband and wife," to evade the law; but as soon as it appeared that there had been a marriage celebrated in due form of law, and the parties had lived together as man and wife for several years and had two children—taking into consideration that a judgment against the parties would fix nothing, but would cause much uncertainty and anxiety, and throw doubt upon the legitimacy of the children, we are inclined to think it would have been well to enter a *nolle prosequi* and allow the validity of the marriage to be drawn in question by some more grave proceeding

Judgment reversed. This will be certified, etc.

PER CURIAM. Judgment reversed. New trial.

Cited: Harris v. *Harris*, 115 N. C., 588.

(525)

SARAH H. STROUD v. H. M. C. STROUD.

Real estate belonging to a partnership is subject to dower in favor of a widow of one of the partners only so far as a surplus may be left after paying the partnership debts.

(*Summey v. Patton*, 60 N. C., 601, cited and approved.)

PETITION FOR DOWER, heard by *Mitchell, J.*, at Fall Term, 1867, of the Superior Court of Orange.

The petition, which was filed against the heirs and surviving partners of the deceased, prayed for dower in a lot in Hillsboro, held by the deceased and his two brothers, as partners in the business of hotel-keeping.

The answer of the surviving partners alleged that the personal assets of the partnership were not sufficient to pay its debts.

The cause was heard upon petition and answer.

His Honor declared that the petitioner was not entitled to dower, and ordered the petition to be dismissed.

Fowle & Badger, for the appellants.
Norwood, and *Phillips & Battle*, *contra*.

READE, J. The answer sets forth the facts, that the hotel lot, in which dower is sought, was purchased by the husband of the petitioner and his two brothers, who are defendants, as partners, to carry on a partnership business of hotel keeping; and that they did for a long time carry on the business, and incur large debts, which are yet unpaid; and that the personal effects of (526) the partnership are insufficient to pay the debts, and that a sale of the hotel will be necessary for that purpose. The cause is heard upon petition and answer. So that it is to be taken that the hotel lot was partnership property.

Our statute (Code, chap. 43, sec. 2), provides that land jointly purchased for partnership purposes shall, upon the death of one partner, survive to the others for the purpose of paying the partnership debts. And when the partnership debts are satisfied, if there is any remainder, such share as would have fallen to the deceased partner, shall be delivered over to his heirs, executors, administrators or assigns. Under that statute, real estate held and used for partnership purposes is subject to partnership debts, to the exclusion of the heir or widow of the deceased. This being so, the remaining question is, suppose there be surplus after the debts are paid, what will become of that? The case of *Summey* v. *Patton*, 60 N. C., 601, decides that it retains its character as real estate and descends to the heir. In that case, the heir takes subject to the widow's right of dower.

The conclusion is, that the hotel lot is liable for the partnership debts after the personal effects of the partnership are exhausted; and that it is the duty of the surviving partners to apply, first, all the other partnership effects to the satisfaction of the debts; and if any remain unsatisfied, then to sell the hotel and apply the proceeds, or so much as may be necessary for that purpose. If there be a residue, they will deliver one-third thereof to the heirs of the deceased partner, subject to the widow's right of dower.

The petitioner will be entitled to have an account of the partnership, and a decree in accordance with this opinion. It will be for her consideration whether an account will subserve her interests.

The costs below already incurred will be paid (527) by the surviving partners who are defendants, and the same may be a charge against the partnership effects

The cost of this court will be paid by the defendants.

This will be certified, etc.

PER CURIAM. Ordered accordingly.

L. E. MAXWELL v. H. J. McBRAYER.

1. After replevying, the defendant in an original attachment has a right to demand declaration from the plaintiff.
2. A suit for breach of promise of marriage can not be commenced by original attachment.

(*Minga v. Zollicoffer*, 23 N. C., 278, cited and approved.)

ORIGINAL ATTACHMENT, dismissed upon motion, by *Buxton, J.*, at Fall Term, 1867, of the Superior Court of Henderson.

The process was returned to that term, and the defendant appeared and replevied. Upon being required by the court to do so the plaintiff stated her claim to be for "unliquidated damages for a breach of marriage contract." The plaintiff excepted to the order by the court requiring her to state her cause of action more specifically than had been done at the time of suing out the process; and from that order, and the order dismissing the suit, she appealed to the Supreme Court.

No counsel for the appellant.
Merrimon, *contra*.

(528) BATTLE, J. After the defendant in the attachment had appeared and replevied by giving bail, he stood in the same condition as if he had been brought into court by ordinary process, and he then had a right to require the plaintiff to file her declaration, or some written statement of her cause of action, such as he might accept in the stead of a declaration. This having been done, and it appearing from her statement that the plaintiff did not claim damages for a tort to her proper person or property, but sought to recover unliquidated damages for a breach of an alleged promise to marry her, the question arises whether such a claim comes within the meaning of the first section of the attachment law. Rev. Code, chap. 7.

The only subjects for which an attachment seems to be provided in the section alluded to, are debts, and demands for damages caused by a tort. It speaks of a person indebted to the plaintiff, or one who has endamaged him as thereinafter mentioned. The after-mentioned endamaging is unquestionably that which is provided for in the sixteenth section of the act, and for which the plaintiff says she does not seek redress under that section. Her claim, then, must be, and her counsel asserts that it is, for a debt under the first section, and we have only to consider whether an unliquidated claim for damages arising from a breach of a promise to marry, can in any proper and legal sense be called a debt. We are decidedly of opinion that it can not, and in support of our conclusion we refer to the reasoning of the court in the case of *Minga* v. *Zollicoffer*, 23 N. C., 278, in which it was first held that a claim for damages caused by a trespass or other tort committed by the defendant, was not a debt within the meaning of the attachment law. The damages which a jury might assess for the breach of such a contract are quite as uncertain as those which might be given for a trespass by an assault and battery on the person, and the (529) amount of them as a debt can no more be sworn to by the plaintiff, his attorney or agent, in the one case than in the other. The case of a tort committed by an absconding wrong-doer was, after the decision in *Minga* v. *Zollicoffer* provided by the act now embraced in Rev. Code, chap. 7, secs. 16, 17, but there is as yet no decision for a case like the present. The plaintiff, by suing in trespass or trespass on the case for the wrong done to her, might have had redress had she proceeded under the sixteenth section of the act within the time therein prescribed; or, as the defendant was not a non-resident, she might perhaps have proceeded against him by a judicial attachment, after a return of *non est inventus* to an original writ of capias.

The judgment of the Superior Court is affirmed, and it must be certified to that court that this court is of opinion that the attachment was not a proper process to be sued out by the plaintiff in this case; that the writ ought to be quashed.

PER CURIAM. Judgment affirmed.

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(530)

Doe on dem. of WILLIE GAITHER v. ANDREW P. GIBSON.

The bargainee in a deed having refused to accept it after it had been acknowledged by the bargainor before a competent officer and a certificate of the acknowledgment appended, a delivery will not be presumed from a subsequent registration, but the *onus* will be upon him who would establish the deed.

(*Snider v. Lackenour*, 37 N. C., 360, and *Baxter v. Baxter*, 44 N. C., 341, cited and approved.)

EJECTMENT, tried before *Buxton*, *J.*, at Spring Term, 1867, of the Superior Court of Caldwell.

The plaintiff declared for four lots in the town of Lenoir, and offered in evidence a contract for the sale of the lots between one Patton as agent for his lessor (Gaither) and the defendant, and it was admitted that the defendant entered into possession under the contract, and that a demand for possession had been made by Gaither before suit.

The defendant offered in evidence a registered copy of a deed from Gaither and his wife, purporting to convey the said lots to the defendant in fee simple. It bore date April 26, 1864, and there was appended a certificate of acknowledgment and a privy examination before Judge Heath, bearing date October 11, 1864, and also a certificate of registration, dated December 13, 1864.

The plaintiff then introduced the original deed from Gaither and wife. It corresponded in date and other particulars with the copy offered by the defendant, but had upon it also a certificate of acknowledgment made by Gaither before the clerk of the County Court, dated December 12, 1864. One of the subscribing witnesses was then examined by the plaintiff, and testified (531) that he was present when Gaither tendered the deed to the defendant; it was between the date of the deed and that of the registration, and his impression was that the certificate of Judge Heath was then upon it; the defendant refused to accept the deed, and objected that Gaither's title to one of the lots was not clear; witness assured him that the title was good. The register testified that the date of the registration was correctly stated in his certificate, and that after the late war closed he returned the deed to Gaither.

His Honor charged the jury that the registration of the deed by the plaintiff's lessor was *prima facie* evidence of a due execution, including assent by the bargainee; that there was no evidence that the bargainor did not intend to convey title by the act of registration or that the bargainee dissented after registration, the evidence, on the contrary, being that he was then claiming under the deed.

The plaintiff thereupon submitted to a nonsuit and appealed.

Folk, for the appellant.

Snider v. *Lackenour*, 37 N. C., 360, and *Airey* v. *Holmes*, 50 N. C., 142, relied on by his Honor, do not sustain his opinion. The dissent of the grantee to the deed being proved, the law presumes him to continue in that state of mind until an assent appears. 1 Gr. Ev., secs. 41, 42. Here actual assent is disproved, and to imply one would be as was said by Ventris, Judge, in *Thompson* v. *Leach*, 2 Vent., 198: "To force an estate down the man's throat in spite of his teeth." See *Armfield* v. *Moore*, 44 N. C., 157.

Malone, contra.

1. The lessor executed the deed in the presence (532) of witnesses, acknowledged the same, together with his wife, and procured its registration, which makes it complete in the absene of dissent by the grantee. *Ellington* v. *Currie*, 40 N. C., 21; 4 Kent (11 ed.), 526, 528, 529, n.; *McClain* v. *Nelson*, 46 N. C., 396; *Baxter* v. *Baxter*, 44 N. C., 341; *Airey* v. *Holmes*, 50 N. C., 142; *Snider* v. *Lackenour*, 47 N. C., 360.

2. Where the attestation shows that the deed was signed, sealed and delivered, the law presumes it a complete instrument, and it can be overthrown only by clear proof. 3 Bat. Dig., 85, sec 10.

3. If the testimony of Bogle was sufficient to establish a refusal to take the deed at that time, it has nothing to do with the subsequent registration of the deed. The procurement of the registration is, in effect, "a second delivery," which makes the deed valid for all legal purposes in the absence of proof of dissent on the part of the defendant.

BATTLE, J. The point raised in the bill of exceptions is an interesting one, and has been well argued by the counsel on both sides. It can not be doubted that if the grantor sign and seal a deed, and afterwards have it proved and registered, or acknowledge it and have it registered, it will, under ordinary circumstances, amount to a delivery of the deed, though the execution was in the absence of the grantee, in whose possession the instrument was never actually placed. See *Snider* v. *Lackenour*, 37 N. C., 360, and the other cases cited by the defendant's counsel. It is equally certain that if under such circumstances the grantee, upon being informed of the transaction, refuse to accept the deed, it will be inoperative to pass the title to him *Baxter* v. *Baxter*, 44 N. C., 341.

In the present case the testimony of the subscribing witness tends to show that the grantee refused to accept the deed when it was tendered to him, and (533) that this occurred between the time when the grantor acknowledged it and had a certificate to that effect placed upon it by a competent officer, and the time when he had it registered. The counsel for the plaintiff contends that a refusal to accept having been proved, the law presumes it to have continued until it was rebutted by proof, either direct or inferential, of a subsequent acceptance. In this position we think the counsel is correct, and being so, his Honor ought not to have told the jury that the act of having the deed registered by the grantor was a delivery of it, and that there was no evidence of a refusal after that time. We think the instructions ought to have been that if the jury should believe from the evidence that the defendant did refuse to accept the deed, they should then inquire whether, from any of the facts proved, they could infer that the grantee had changed his mind and agreed to receive it.

For the error above indicated the judgment must be reversed, and a *venire de novo* ordered.

PER CURIAM. *Venire de novo.*

Cited: *Frank* v. *Heiner*, 117 N. C., 82.

(534)

CHRISTOPHER EDWARDS v. NANCY EDWARDS.

A petition for divorce because of adultery by the defendant, need not allege that the petitioner has not been guilty of adultery.

PETITION FOR DIVORCE, heard *ex parte* before *Buxton*, *J.*, at Fall Term, 1867, of the Superior Court of Yancey.

The petition prayed for a divorce on account of adultery by the defendant. Upon reading it to the court, it appeared to contain no allegation that the petitioner himself had not been guilty of adultery. Thereupon the court declined to proceed unless the petition was amended upon that point. The petitioner excepted to this ruling, and declined to amend as required, but offered to submit his conduct and character to the jury on a proper issue. His Honor thereupon dismissed the petition, and the petitioner appealed.

Merrimon, for the appellant.
No counsel *contra*

PEARSON, C. J. It is a maxim in courts of equity that "a party must come in with clean hands," and probably it would be good policy to require one who files a petition for a divorce to purge his conscience in the manner indicated by his Honor. It certainly would prevent a great many applications.

But the subject of divorce is regulated by statute, Rev. Code, chap. 39, "Divorce and Alimony," and there is nothing in the statute to authorize a construction, which would empower the court to impose a "test oath" of this kind. On the contrary, the fifth section, which declares what matter shall be set out in (535) the petition, is silent as to an averment of this kind; and the tenth section provides that, if such matter shall be proved, "the same shall be a good defence, and a perpetual bar against the suit," thus expressly making it a matter of defence, and no where intimating that the party shall take an oath of his own innocence as a condition precedent to the right of instituting the suit.

Order in the court below reversed. This will be certified.

PER CURIAM. Order reversed.

Cited: Steel v. *Steel,* 104 N. C., 637; *O'Connor* v. *O'Connor*, 109 N. C., 142.

STATE v. JOHN D. COOK.

1. The amnesty act of 1866-67, ch. 3, was not intended to exempt soldiers from punishment because they were soldiers, but only for acts committed by them as soldiers; therefore:
2. Where the prisoner was charged with breaking a dwelling-house and stealing a watch, money, etc., and he failed to show that he acted under military orders, or in the discharge of a military duty, the fact that he was a soldier was held to be no bar under the plea of the amnesty act, to a prosecution for burglary.
3. It appearing in this court, upon appeal by a prisoner, that a verdict of guilty had been entered below, the court can not arrest the judgment because the judge had not the power to impose the punishment ordered by him, but as the appeal vacated that judgment, must send the case down for such judgment as the law allows.

(*State v. Blalock, ante,* 242, cited and approved.)

BURGLARY, tried before *Gilliam, J.*, at Fall Term, 1867, of the Superior Court of McDowell.

The prisoner was indicted in the Superior Court of Rutherford, Spring Term, 1867, with one Alphonzo Johnston, for breaking into the house of one J. (536) A. Sweet in the nighttime and stealing a rifle, a watch and fifty dollars in gold. The prisoner was arraigned in that court, but, upon affidavit, his trial was removed to McDowell.

The fact of the breaking and robbery by the prisoner was established, and he relied on the plea of the Act of "Amnesty and Pardon," ratified the 22d day of December, 1866. The prisoner entered the Confederate army as a conscript in 1863, but was a deserter in the month of February, 1865, when the offence was committed. These facts being admitted, a verdict of guilty was entered, subject to the opinion of his Honor as to whether the prisoner could take any benefit from the above act of Assembly. The court, being of opinion that he could not, under a military order issued by the Commander of this District, gave judgment of imprisonment against the prisoner, and he appealed.

Merrimon, for the appellant.
Attorney-General, *contra*.

READE, J. The Amnesty Act of 1866–7 provides that no officer or private, in either the United States or Confederate armies, shall be held to answer on any indictment for any act done in discharge of any duties imposed on them by the laws of the United States, or of the Confederate States, or by virtue of any army order. And, in construing that act, in *State* v. *Blalock*, *ante*, 142, we said that "it embraces all who may be supposed to have committed crimes or injuries, by reason of their connection with the late war, whether they were officers or privates; whether they were of the Federal or Confederate forces; and whether they have been convicted or not." The defendant craves the benefit of that act. But it can not be allowed him; because it does not appear that his offence had any connection with his war duties.

(537) It is not alleged that he acted under any military order, or in the discharge of any military duty. He is charged with breaking a dwelling-house and stealing a rifle, a watch and fifty dollars. It is not to be presumed that such conduct had any connection with his war duties. It was not the intention of the act to exempt persons from punishment merely because they were soldiers; but only for acts which they committed as soldiers.

There was a motion in arrest of judgment, for the reason that the punishment ordered by his Honor was unauthorized. Suppose that to be so, we can not arrest the judgment, because there is of record the verdict of guilty, and some judgment is necessary.

The appeal vacates the judgment which was announced, and we can only say that there is no error in the record, and send the case back for such judgment as the law allows.

There is no error. Let this be certified, etc.

PER CURIAM. Judgment affirmed.

Cited: State v. *Keith*, 63 N. C., 142; *State* v. *Shelton*, 65 N. C., 296; *State* v. *Cuningham*, 72 N. C., 478; *State* v. *Driver*, 78 N. C., 431; *State* v. *Lane*, 80 N. C., 406; *State* v. *Lawrence*, 81 N. C., 525.

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(538)

MARY A. WOOD v. JAMES A. WOOD.

1. An order for alimony *pend. lite* creates a debt by record, and may be enforced by either a rule and consequent attachment, or by a *fi. fa.*
2. Such an order is not necessarily affected by the failure of the petitioner to obtain the relief prayed for.
3. One who has been committed under such an attachment can be discharged only by payment, or by resorting to the relief given by the insolvent debtor's act.
4. The act of 1866-67, abolishing imprisonment for debt, does not embrace cases of commitment under attachment for a failure to comply with an order of court.

(*Clerk's Office v. Allen*, 52 N. C., 156, cited and approved.)

MOTIONS in a divorce cause, heard before *Warren, J.*, at a Special Term of the Superior Court of Wayne, held upon the first Monday of January, 1868.

The petition was for a divorce from the bonds of matrimony, and at a previous term alimony *pendente lite* had been granted. The defendant having failed to comply with the order was, after a full hearing, at Fall Term, 1867, adjudged to be in contempt, and was thereupon committed. At the Special Term the divorce cause was tried, and decided against the petitioner.

Thereupon the defendant moved that the order allowing alimony, and the order committing him for a contempt, should be rescinded, and that he should be discharged from imprisonment.

The court, *pro forma*, refused to allow either motion, for want of power; and the defendant appealed.

Bragg, for the appellant.

There are two kinds of contempt—one direct (ex. gr., an indignity offered to the court), for which a (539) party may be punished by imprisonment at discretion. The other, in not performing an order or decree in some case, as here.

Attaching a party for non-performance and placing him in contempt, is for the benefit of the other party—in this case the wife.

As a general rule, a party can not be heard in any case in which he has been put in contempt, except for the purpose of clearing his contempt. Adams' Eq., 324–26 and 393, 394, 395. But he may move to discharge an order, though in contempt for not executing it. Mosely Rep., 258.

The order in this case, made by virtue of Rev. C., chap. 39, sec. 15, was interlocutory only (see act). The proceeding, though an equitable one, was in a court of law. The court had full power at any time to change, or modify it, or set it aside. The Judge therefore erred as to his want of power. Indeed he ought to have dismissed the petition, and that would have carried the order with it. The petitioner, having failed to establish her right to divorce or alimony, the alimony allowed, *pendente lite*, can not and ought not to be collected. The order for it is virtually nullified. The money, if paid into court, is the husband's, not the wife's. Should she take it, he would have a right to retake it from her. The law does not require a vain thing to be done, and it was in the power of the Judge to act upon such considerations.

It has been held that arrearages of alimony can not be collected by the wife's executors after her death.

Shelford on M. & D., 602, and cases cited. Here the wife is not dead, but her separate existence is, in law, merged in that of the husband. It is as effectual, so far as she is concerned, as if the money had been paid, no one else being concerned in enforcing the decree. The dignity of the court is not concerned.

2. The contempt was fully and completely waived by the subsequent proceedings and trial The defendant was fully recognized by the petitioner (540) and the court as having a status therein, and the petitioner had no right to ask his further detention on that order for the contempt. 1 Dan. Ch. P., 560; 1 Ves. & B., 325; 2 *Ibid.*, 100; 15 Ves., 174.

3. At all events the court, which is the same court by which he was put in contempt, had a discretion, and was not entirely without power to act. Otherwise a party might be imprisoned forever, when the performance of a decree or order was impossible. But in such a case the court will discharge. Exch. Rep; 6 Price, 321, note. Also *Requi* v. *Paty*, 2 La. Reg., 1108; *Rex* v. *Baker*, 1 H. Blk., 543; Watson on Sh'ffs., 7 L. L., 89, top; Sewell on Sh'ffs., 46 L. L., 407, top.

4. In England it is held that an insolvent, in custody for contempt for non-payment of money or costs, is entitled to discharge under the insolvent acts. It seems a rule of the courts of equity which I find cited, 2 Chitty's Eq. Dig., 907.

Our late act abolishes imprisonment for debt. Can a party be imprisoned now for not satisfying a money decree when ordered to do so by a court of equity, on the ground that it is a contempt? It seems to me it can no more do so than can a court of law imprison upon a *ca. sa.* *Wheldale* v. *Wheldale*, 16 Ves., 376 and notes; 3 Desauss., 264-549.

5. The case of *Love* v. *Camp*, 41 N. C., 209, does not contravene the principles contended for here.

No counsel, *contra*.

BATTLE, J. The alimony which the court is authorized by the fifteenth section of the fortieth chapter of the Revised Code to decree to the petitioner for the support of herself and her family, at any time during the pendency of a suit for divorce, can not be regarded in any other light than as a debt. It is a certain sum of money which the court ascertains and orders to (541) be paid by the husband to the supposed-to-be-injured wife, not only to enable her to live, but to furnish her with the means for prosecuting her suit. It is therefore a debt of record, the payment of which the court may enforce either by a rule upon him and an attachment thereon, or by the milder process of a *fieri facias.* A court of law, when it has the alternative of pursuing either the one course or the other, usually adopts the latter (*Clerk's Office* v. *Allen*, 52 N. C., 156), while a court of equity more frequently resorts to the former. Petitions for divorce may be filed either in a court of law or a court of equity, though the mode of proceeding, whether brought in one or the other, is regulated, mainly, if not altogether, by the rules of practice which prevail in chancery. Hence in the present suit, upon the non-payment by the defendant of the sum or sums of money decreed for alimony *pendente lite*, he was ordered to be attached for a contempt of the court, and was thereupon committed to jail. His imprisonment was not for any indignity offered to the court and on that account inflicted as punishment, but must be considered to be in the nature of an execution for debt in which the body is taken under a *capias ad satisfaciendum.* Viewed in this light, which we think is the only proper light in which it can be viewed, the defendant can not be discharged unless he pays the debt, or proceeds in a proper manner to take the benefit of the insolvent debtor's act. But it is said that as the suit terminated in favor of the defendant, it would be useless to compel him to pay the money, since being paid to the wife it would immediately become his again. But it is not certain that the wife was entitled to receive it, because being ordered for the support and maintenance of herself and family, and also to enable her to carry on the suit, she may have been compelled to assign her interest in it to get the means of living while her husband was in default by his non-payment of it. (542) The court of equity would, of course, protect such an assignment, and that it may do so in every case, the rule must be that the court has no power to discharge the defendant from the execution even though the suit may terminate in his favor.

It is said again that the defendant was entitled to be discharged by the late act for abolishing imprisonment for debt. See act of 1866-'67, chap. 63. We were of that opinion at first, but upon a careful examination of the act, we find that by its terms it is confined to the ordinary proceeding in a court of law, and does not embrace a case like the present. Our conclusion, therefore, is that his Honor in the court below was right in deciding that he had no power to discharge the prisoner, and that his judgment must be affirmed.

But it does not necessarily follow that the defendant, if unable to pay, is without remedy. He is to be regarded, as we have already intimated, as a debtor, and in execution for a debt, and as such it may well be contended that he is entitled to the benefit of the insolvent debtor's act. Rev. Code, chap. 59. That act has always received a liberal interpretation, and it may be that the defendant's case comes within the meaning of the first or sixth section The words in the first section, "If any person shall be taken or charged on any mesne process, or shall be taken or charged on execution for any debt or damages rendered in any action whatever," are very broad: and so are the words of the sixth section, "When any debtor shall be taken on any *capias ad satisfaciendum*, or after judgment be in the custody of the sheriff or other officer by the commitment of the court, or by surrender of bail out of court, for any debt or contract whatever."

In connection with this subject, see the case of *Wheldale* v. *Wheldale* 16 Ves., 376, to which we were (543) referred by the counsel for the defendant in his learned argument before us.

The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

THE STATE v. RICHARD PUTNEY.

The Act of 1866-'7, c. 82 (25th February, 1867), which punishes the stealing of mules, etc., with death, did not repeal the law prohibiting that crime previously, except as to offences thereafter committed; therefore where one was convicted at Fall Term, 1867, of stealing a mule, under an indictment found in December, 1866: *Held*, that the question of punishment was not affected by the act first mentioned.

LARCENY, tried at Fall Term, 1867, of the Superior Court of Wake, before *Fowle, J.*

The indictment had been found at a Court of Oyer and Terminer, held in December, 1866. The defendant, having been convicted at Fall Term, 1867, moved in arrest of judgment, and the motion, having been granted, the Attorney-General appealed.

Attorney-General, for the State.

There is no express repealing clause, and the court will not imply a repeal from what appears upon the face of the Act of 1866–'67. Pegram's Case, 1 Leigh, 623; Myatt's Case, 6 Rand., 694; 2 Strob., 17; *Queen* v. *Pugh and al.*, 1 Mod., 107; *State* v. *Aiken*, 39 N. H., 179; *State* v. *Taylor*, 2 McCord., 491; *Sturgeon* v. *State*, 1 Blackf., 39, note; Sedge. Stat. Const., 125.

Haywood & Badger, contra.

(544) 1. The Stat., 1866–'67, being affirmative, repeals so much of the old law as relates to the punishment—that being inconsistent with its own provisions. 1 Bish. Cr. L., secs 197, 203 to 205; *State* v. *Upchurch*, 31 N. C., 454; *Nicholls* v. *Squire*, 5 Pick., 168; *Comm.* v. *Kimball*, 21 Pick., 373; *Sullivan* v. *People*, 15 Ill., 133; *Rex* v. *Cator*, 4 Bur., 2026.

2. In cases like this the intent of the Legislature, that former offenses may be prosecuted under the old law, must appear affirmatively on the face of the new statute upon a strict construction of it. Bish., sec. 217; Pegram's Case, 1 Leigh, 569; *Allen* v. *Commonwealth*,

2 Leigh, 727; *Pittman* v. *Commonwealth*, 2 Rob. Va., 800; Anon., 1 Wash. C. C., 84 and 89.

READE, J. At the time when the offence was committed, larceny was punishable with whipping, imprisonment and fine—one or all. *State* v. *Kearzey*, *ante*, 481. Our Statute of 1866–'67, chap. 82 (February 25, 1867), punishes larceny of a mule, etc., with death. And now it is insisted that this defendant can not be punished at all: not under the Statute of 1866–'67, because the offence was committed prior thereto; and not under the old law, because it is repealed by the new.

It is true that the defendant can not be punished under a law which was not in existence at the time when the offence was committed, because that law would be *ex post facto*, unless where it lessens the punishment. It is equally true that, where a new law expressly or impliedly repeals the old law, there can be no conviction under the old law. But the Act of 1866–'67 has no application to the case before us, because it does not repeal the old law, but is only prospective in its character and is to be read thus: If any person shall hereafter steal a mule, etc., he shall suffer death. All larcenies committed before that act are to be tried and punished without reference thereto.

(545) The motion in arrest of judgment ought not to have been allowed.

There is error. Let this be certified, etc.

PER CURIAM. Ordered accordingly.

Cited: State v. *Wise*, 66 N. C., 123; *State* v. *Massey*, 103 N. C., 360; *State* v. *Coley*, 114 N. C., 883.

JAMES R. S. WALKER v. SALLY WALKER.

Where one had been induced to remove from Tennessee and come to this State by a promise of employment and other pecuniary advantages, and after doing so he and the person who made the promise (his sister) quarreled, he inflicted a battery upon her, and she refused to comply with her engagement: *Held*, upon a reference of their "matter in dispute," the sister had a right to introduce testimony as to the battery, for the consideration of the referees.

(*Fly v. Armstrong*, 50 N. C., 339; *Lane v. Phillips*, 51 N. C., 455; *Hendrickson v. Anderson*, 50 N. C., 246; and *Walker v. Walker*, 60 N. C., 255; cited and approved.)

DEBT UPON AN AWARD, tried before *Mitchell, J.*, at Fall Term, 1867, of the Superior Court of Orange.

It appeared in evidence that the defendant, who was a single woman and sister of the plaintiff, had induced him to return from Tennessee, to which State he had removed, by promise of pecuniary advantage; that after his return they had fallen out, he had beaten her, and she refused to comply with her engagement. They then agreed to leave the "matter in dispute" to two referees, and the submission bond executed by them, provided that upon the arbitration the plaintiff might have "his letters examined with other testimony," and that the defendant might "produce testimony to rebut the evidence in said letters"; in the meantime, that the plaintiff should surrender possession of certain (546) property belonging to the defendant; the bond concluded by providing that either party should pay to the other whatever damages should be awarded.

The award, amongst other things not necessary to be stated here, directed the defendant to pay to the plaintiff $500.

Upon the trial in the court below, after the plaintiff had made out his case, the defendant suggested that the award had been wrongfully conducted, and thereupon showed that she had offered evidence before the arbitrators of the battery committed upon her by the plaintiff, whereby she said that she had been greatly injured, and that they refused to hear it.

One of the arbitrators testified that, although they had refused to hear the evidence, as not pertinent to the matter submitted to them, they had, notwithstanding, taken it into consideration, and awarded to the plaintiff a less amount of damages upon that account.

His Honor instructed the jury that the evidence offered by the defendant was properly excluded by the arbitrators.

Verdict for the plaintiff. Rule for a new trial discharged. Judgment, and appeal.

Phillips & Battle, for the appellant.
Norwood, *contra*.

BATTLE, J. When this case was before the court, at June Term, 1864 (60 N. C., 255), it was decided that parol evidence was admissible to show what matters were submitted to arbitration, and what matters were brought to the attention of the arbitrators, and because such evidence had been rejected in the court below, the judgment was reversed and a *venire de novo* ordered. The question presented in the bill of exceptions on the present appeal is whether the testimony offered by the defendant to show that the plaintiff had commit- (547) ted a battery upon her, whereby she was greatly injured, and which the arbitrators had refused to hear, was pertinent to the matters referred to them. His Honor held in the court below that it was not, and in that we think he erred.

It appears from the terms of the submission and the facts stated by the arbitrators in their award, that the plaintiff, being a brother of the defendant, was induced by her to remove from Tennessee, where he then resided, and to come and take charge of his sister's mill in Orange County, North Carolina; that in the course of his management of her business they fell out and quarreled and they agreed to submit the matters in dispute between them to arbitration.

On the trial before the arbitrators the plaintiff's grounds of complaint were fully heard and considered, and then the defendant offered to prove, on her part, that the plaintiff, during their business connection, committed a battery upon her, but the arbitrators refused to hear the testimony, because they considered it to be irrelevant. In our view of the case it was not only relevant, but important. The plaintiff was in the employment of the defendant as the manager or keeper of her mill. The business connection between the parties was very much the same as that which exists between an employer and an overseer. As employer, the defendant had the right to inquire into the manner in which the plaintiff was conducting her business, and if he were misbehaving himself she had the right to discharge him, and, under certain circumstances, without pay. *Fly* v. *Armstrong*, 50 N. C., 339; *Lane* v. *Phillips*, 51 N. C., 455. The question, what is sufficient cause for a dismissal, is one of law. *Hendrickson* v. *Anderson*, 50 N. C., 246. And we think an unjustifiable battery of the employer by the manager or overseer would be a sufficient cause for dismissal. At all events, it would be a proper matter to be considered in estimating the damages to which the party dismissed was entitled for having been discharged from his employment. (548) The arbitrators seem to have had a vague idea that the defendant had some claim to compensation for beating, as they said that they had awarded the plaintiff a less amount of damages in consequence of it. It is strange that this idea had not suggested to them the inconsistency and injustice of attempting to decide upon the defendant's claim while refusing to hear her proof to show what it was with all its attendant circumstances.

In estimating the compensation to which the defendant was entitled, for the battery committed upon her, we are not to be understood as including damages for the mere pain which her person may have suffered.

As the arbitrators erred in deciding to reject the defendant's testimony, for irrelevancy, so the court erred in sustaining their decision. The consequence is that the judgment must be reversed and a *venire de novo* awarded.

PER CURIAM. *Venire de novo.*

Cited: *Patton* v. *Garrett*, 116 N. C., 858.

(549)

Doe on dem. of ISHAM YOUNG v. R. J. PERRY.

A mere occupier of land, has no estate which upon quitting possession he can transfer to another; and one who goes into possession under such circumstances (without permission of, or recognition by the owner) is liable to be treated by him as a trespasser, and to be ejected without a previous notice to quit.

(*Eaton v. George*, 48 N. C., 385, cited and approved.)

EJECTMENT, tried at December (Special) Term, 1867, of the Superor Court of Wake, before *Barnes, J.*

The lessor showed title in himself as purchaser at a sheriff's sale under executions against one Thomas Williams, who it was admitted was at that time the owner.

At the time of such sale the defendant was in possession of the land, and continued to be at the time that the declaration was served. His possession was acquired from one John Williams, the father of Thomas, who by his son's permission had been in possession of the land for some sixteen years, and who, upon leaving it, had put the defendant in possession. There was no notice to quit, or demand of possession by the plaintiff.

By consent of the parties, a verdict was taken for the plaintiff, subject to the opinion of the court. His Honor, being of opinion that the defendant was entitled to demand of possession or notice to quit, set the verdict aside, and gave judgment of nonsuit.

Rule for new trial discharged, and appeal.

Haywood, for the appellant.
Rogers & Batchelor, *contra*.

BATTLE, J. This cause has been elaborately argued and presented in many different views by the (550) counsel, but the only aspect in which the proof allows us to consider it makes it clear that the plaintiff is entitled to a judgment. The defendant was not a tenant of any kind to Thomas Williams, to whose title the lessor of the plaintiff succeeded, and, therefore, was not entitled to any notice to quit, or demand of the possession before the action was brought. *Eaton* v.

George, 48 N. C., 385. John Williams, the father of Thomas, was a tenant by sufferance, or rather an occupier by license of his son, because he entered upon the lots in question by the permission of his son; but, when he quitted the possession, he had no estate or right which he could transfer to another person. It does not appear that Thomas Williams ever gave the defendant permission to enter, or to remain upon the land after he had entered, or in any way recognized him as a tenant, and, consequently, he might have treated him as a trespasser by suing him in an action of trespass *quare clausum fregit;* or he might have brought ejectment against him without notice or demand of possession. Such being the case, it follows that the lessor of the plaintiff, as the purchaser at sheriff's sale of Thomas Williams' interest in the land, was entitled to the same remedies. See 2 Crabb, Real Prop., 438 (55 L. L., 280).

The judgment of nonsuit must be reversed, and a judgment upon the verdict entered for the plaintiff.

PER CURIAM. Judgment reversed.

(551)

DAVID ISRAEL, Ex'r, v. NANCY IVEY *et al.*, Ex'rs of C. Ivey.

1. Where there is a defect of jurisdiction as to the subject-matter of a suit, the court will stay its proceedings in the cause, however the defect may be made to appear; therefore,
2. Where a suit was brought in the County Court upon a contract entered into before the 1st of May, 1865, and the date of the contract was made to appear by affidavit in the form of a plea to the jurisdiction: *Held*, without deciding whether the plea was sufficient in form, that under the ordinance of June, 1866, the court should dismiss, upon motion, or suggestion, or *ex mero motu.*
3. In such case, upon appeal the Superior Court acquired jurisdiction only so far as to decide whether the judgment of the County Court was erroneous.

(*Burroughs v. McNeil*, 22 N. C., 297; *Branch v. Houston*, 44 N. C., 85, and *Skinner v. Moore*, 19 N. C., 138, cited and approved.)

DEBT, tried before *Warren*, J., upon a plea to the jurisdiction, at Fall Term, 1867, of the Superior Court of Robeson.

The action was brought to August Term of the County Court against the defendants (six in number) as executors *de son tort* of Charles Ivey, upon a bond executed by him to the plaintiff's intestate. No declaration was filed in that court and the defendants failed to crave Oyer. Instead thereof they filed the following plea:

And the said defendants, in their proper persons, come and defend the wrong and injury, etc., and pray judgment of the said writ of the plaintiff, and say that the contract entered into by the alleged testator was made prior to May 1, 1865, and this the said defendants are ready to verify; wherefore, they pray judgment, (552) whether this court will take further cognizance of the action aforesaid.

(Signed) NANCY IVEY,
D. T. MCNEILL,
R. M. NORMENT.

The plaintiff demurred to the plea, but the County Court rendered judgment sustaining the plea and quashing the writ. Whereupon the plaintiff appealed.

In the Superior Court his Honor sustained the demurrer and gave judgment of *respondeat ouster*, and the defendants appealed to this court.

Phillips & Battle, for the appellants.
Person and *W. F. French*, *contra.*

BATTLE, J. This case has been argued with much ingenuity by the counsel for the plaintiff, but the force of the argument is insufficient to prevail against one of the objections taken by the counsel for the defendants. That objection is, that at the time when the suit was instituted, the County Courts of the State had no jurisdiction whatever of the subject-matter of it. See Acts of second extra session of 1861, chap. 10, sec. 1; and also the acts of the special session in 1867, chap. 17, sec. 1, and ordinances of the Convention (session in 1866, chap.

3). The effect of this legislation was to confer original and exclusive jurisdiction upon the Superior Courts in all actions of debt founded upon contracts made prior to the 1st day of May, 1865, and of course to take it away from the County Courts. The objection, then, is that there was a defect of jurisdiction in the County Court to entertain the present suit. "A defect of jurisdiction (says the court in *Burroughs* v. *McNeil*, 22 N. C., 297), exists where courts of particular limited jurisdiction undertake to act beyond the bounds of their (553) delegated authority (*Green* v. *Rutherforth*, 1 Ves., Sen., 471), or where a Superior Court of general jurisdiction passes upon subjects which, by the Constitution or laws of the country are reserved for the exclusive jurisdiction of a different judicial or political tribunal, as where the Court of Chancery in England undertakes to determine cases belonging solely to the cognizance of the King in council. *Penn* v. *Lord Baltimore*, 1 Ves., Sen., 446. In these, and cases like these, there is a plain defect of jurisdiction. The exercise of power here would be usurpation, for no consent of parties can confer a jurisdiction withheld by law: and the instant that the court perceives that it is exercising, or is about to exercise a forbidden or ungranted power, it ought to stay its action, and, if it do not, such action is in law a nullity." To the same effect is the case of *Branch* v. *Houston*, 44 N. C., 85, in which it is said that "*ex necessitate*, the court may, on plea, suggestion, motion, or *ex mero motu*, where the defect of jurisdiction is apparent, stop the proceeding. Tidd., 516, 960. See also *Skinner* v. *Moore*, 19 N. C., 138, and the note to the second edition.

In the case now before us we are bound to take notice of the want of jurisdiction in the County Courts, of suits on contracts entered into before the 1st day of May, 1865, and the plea of the defendants, supported by an affidavit of three of the number, was sufficient to inform the court that the contract upon which the suit was brought was made prior to that time. The objection to the affidavit, that it ought to have been sworn to by all the defendants, can not be supported. It would be sufficient if it had been made by a third person. See 1 Chit. Plead., 463. Without deciding, then, upon the sufficiency of the plea in matters of form, we can say that it was sufficient for the purpose of bringing to the attention of the County Court the fact that it was called upon to adjudicate in a case in which it had no (554) jurisdiction, and that thereupon the County Court did right in giving a judgment against the plaintiff. The case of *Branch* v. *Houston*, *ubi supra*, is a direct authority to show that the Superior Court did not acquire any other jurisdiction of the cause by the appeal than what was necessary to enable it to decide whether the judgment of the County Court was erroneous or not.

The judgment of the Superior Court must be reversed, and a judgment be given here that the writ be quashed.

PER CURIAM. Judgment reversed.

See: Deaver v. *Keith*, *ante*, 430; *McCubbins* v. *Barringer*, *post*, 555.

Cited: Caldwell v. *Beatty*, 69 N. C., 370; *Hannah* v. *Railroad*, 87 N. C., 353.

THE STATE *ex. rel.* JAMES S. McCUBBINS v. DAVID BARRINGER *et al.*

1. The acts and the ordinances which have taken away from the County Courts jurisdiction over contracts entered into before May, 1865, are not on that account unconstitutional.
2. The order of General Sickles, No. 10, does not restore that jurisdiction as regards minors suing upon guardian bonds, etc.

(*Thompson v. Floyd*, 47 N. C., 14; *Berry v. Haines*, 4 N. C., 311; *Israel v. Ivey*, *ante*, 551, cited and approved.)

DEBT, upon a guardian bond, quashed upon a plea to the jurisdiction, before *Gilliam, J.*, at Fall Term, 1867, of the Superior Court of Rowan.

On the 22d of April, 1867, the plaintiff, as guardian of certain infants, procured to be issued from the County Court a writ upon the bond of a former guardian, executed before 1861. Upon the writ being executed (555) and returned, the defendants filed a plea to the jurisdiction, and the plaintiffs demurred thereto. In the County Court the demurrer was sustained, but, upon appeal, that judgment was reversed in the Superior Court, and the writ quashed. Thereupon the plaintiff appealed to this court.

Blackmer & McCorkle, for the appellant.
Boyden & Bailey, *contra*.

Battle, J. We have decided in the case of *Israel* v. *Ivey*, *ante*, 551, that the Courts of Pleas and Quarter Sessions had no jurisdiction of actions founded upon contracts entered into prior to the 1st day of May, 1865, because it had been taken away and vested exclusively in the Supreme Courts by the acts of the Legislature at second extra session of 1861, chap. 10, and special session of 1867, chap. 17, sec. 1, as well as by an ordinance of the Convention of 1865 (session in 1866, chap. 3). It is true that the counsel in that case did not raise the question whether such legislation was a violation of that clause of the Constitution of the United States which prohibits any State from passing a "law impairing the obligations of contracts." Had such an objection been made to the validity of the statute or ordinance, we should have decided that the objection could not be sustained. The jurisdiction of the County Courts was conferred by the Legislature, and that body has always claimed, without question until recently, the power to regulate it in any manner which it was thought the good of the State required. Acts to take from the County Courts of certain counties the power to try causes in which the interposition of a jury may be necessary, have been passed from time to time for at least half a century, and the authority of the Legislature to pass such acts, so far from being denied, has been expressly sanctioned by judicial decision. See

(556) *Thompson* v. *Floyd*, 47 N. C., 313. If, then, the Legislature had the power to take away a part of the jurisdiction of one or more of the County Courts of the State, it unquestionably had the power to take it away from all; and nothing but the connection of such legislative action with what is called the "Stay Law" would ever have induced anybody to doubt it. It may be that other provisions of the "stay law" are unconstitutional (as to which we shall not express any opinion until the question is brought before us): but it is well settled that one section or clause of a statute may be unconstitutional, while the remaining are not at all liable to that objection. *Berry* v. *Haines*, 4 N. C., 311, 428.

Having disposed of the constitutional objection, it remains for us to consider the one raised on the sixteenth section of Gen. Sickles' Order No. 10. The part of that order which applies to the case before us is in the following words: "Nor shall this order, or any law of the provisional governments of North or South Carolina, operate to deny to minor children, or children coming of age, or their legal representative, nor to suspend as to them, any right to action, remedy or proceeding, against executors, administrators, trustees, guardians, masters or clerks of Equity Courts, or other officers or persons holding a fiduciary relation to the parties or the subject-matter of the action or proceeding." This order was issued the 11th of April, 1867, and the counsel for the plaintiff contends that its effect is to restore to the County Courts the jurisdiction which they had in relation to suits upon guardian bonds before the adoption of the act and ordinance to which we have heretofore referred. We are clearly of opinion that such a construction of the order is inadmissible. It is unnecessary, and therefore it would be improper for us to decide any question in relation to that order except the one
(557) whether it is applicable to the present case. At the time when it was put forth, the Superior Courts of law had, and the County Courts had not, jurisdiction of suits upon all bonds given by guardians prior to the 1st day of May, 1865. Full operation and

effect may be given to the order by applying it to the Superior Courts, and preventing them from interposing any delay in the prosecution of such suits, without attributing to it the extraordinary efficacy of creating and conferring a jurisdiction upon courts which then had none over the subject-matter; this extraordinary efficacy to be ascribed too, although it is manifest that it can not accomplish the purpose which it is said the order had in view; that is, prevent delay. Now, it is certain that this can not be done, unless we attribute to the order the further effect of taking away from the defendants in the suits the right of appealing from the judgment of the County Court to the Superior Court. No person contends for this, and yet without it the construction insisted upon by the plaintiff's counsel would amount to nothing in the way of a practical benefit to minor children or those coming of age, who wish to sue their guardians upon their bonds.

Our conclusion is that the judgment of the Superior Court must be affirmed, and that this must be certified, to the end that the demurrer to the plea be overruled, the plea sustained and the writ quashed.

Per Curiam. Judgment affirmed.

Cited: *McCless* v. *Meekins*, 117 N. C., 39; *Russell* v. *Ayer*, 120 N. C., 201; *Johnson* v. *Winslow*, 63 N. C., 553; *Varner* v. *Arnold*, 83 N. C., 209; *Riggsbee* v. *Durham*, 94 N. C., 805; *Greene* v. *Owens*, 125 N. C., 222.

(558)

STATE v. J. A. BUCKNER, ROBERT BUCKNER and MORGAN BUCKNER.

1. In an indictment for forcible trespass it is sufficient to charge, that the defendant entered the premises with a strong hand the prosecutor being then and there present.
2. Where the land on both sides of a road, whether public or private, belongs to the prosecutor, he is the owner of the soil over which the road runs; and persons who stop upon such road, and use violent and menacing language to him, are guilty of forcible trespass.
3. The only privilege which the public have in a public road is that of passing over it, and those who abuse that privilege become trespassers *ab initio*, and create a nuisance.

FORCIBLE TRESPASS, tried before *Buxton*, *J.*, at Fall Term, 1867, of the Superior Court of Buncombe.

The indictment charged that the defendants, "with force and arms in and upon a certain piece of land of A. G. Anderson (the prosecutor), situate in said county, unlawfully, violently, forcibly, injuriously, and with a strong hand, did enter, the said A. G. Anderson being then and there present upon the said land," etc., "to the great damage of the said A. G. Anderson and against the peace and dignity of the State."

Upon the trial it appeared that the defendants had entered a lane which ran in front of the prosecutor's house, and had gone to a gate which opened into his yard at a distance of some forty feet from the front of the house, and there called to him in abusive and threatening language, ordering him to come out, to leave the country, etc. During this time Anderson was in the (front) porch of his house; one of the defendants had in his hand a rock, another a stick and cowhide, and the third had a pistol.

Under the instructions of the court the jury returned a verdict for the State; and, motions for a new (559) trial and in arrest of judgment having been overruled, there was judgment, and appeal.

Merrimon, for the appellant.
Attorney-General, *contra*.

READE, J. The indictment charges that the defendant entered the premises with a strong hand, the prosecutor being then and there present. That is a sufficient charging of the forcible trespass.

The question remains whether the facts proved sustain the charge.

There were three of the defendants. They were armed with a rock, a stick, a cowhide and a pistol. They were violent in manner and threatening in language, demanding of the prosecutor to come out and take a whipping, and leave the neighborhood. This was at his gate, and within forty feet of his house. If this was not calculated to alarm the prosecutor, and did not tend to a breach of the peace, then we are at a loss to know what sort of conduct would have that effect.

The defence was put mainly upon the ground that the defendants were in a lane or road which passed over the land of the prosecutor and near to his house, which the public had used for sixty years, and that thereby it became a public road, in which the defendants were at liberty to do as they pleased. All misbehavior is aggravated by being in a public place. The only privilege which the public have in a public road is that of passing over it. If they misbehave in it, they create a nuisance. The road is for travel and for no other purpose. The property in the soil is not in the public but in the owner of the land over which it runs. The soil, the trees, the rocks, the grass in it and on the side of it, are all his. It would be monstrous if, because a landowner dedicates to the public the right to pass over his (560) land in travel, they should use it as a platform from which to assail him with impunity. Whether it was a highway or a private way, or no way at all, makes no difference. Grant that the defendants had a right to pass along the way, and that the entry, if peaceable, was not even a civil trespass, yet as soon as they committed the violence charged, they were trespassers *ab initio*. This would have been so, if they had stood in the middle of the road; but they left the road and went up to the gate, and stood there.

There is no error in the ruling of his Honor, and none in the record.

This will be certified, etc.

PER CURIAM. There is no error.

Cited: State v. *Widenhouse*, 71 N. C., 280; *State* v. *Davis*, 80 N. C., 352.

W. B. MARCH and E. D. HAMPTON v. URIAH H. PHELPS.

A bill of sale in the following words: "Received of M. & H. $2,000 for a negro boy named Allen, 26 years old, said negro is warranted sound in mind and in body, and the title good:" *Held*, to contain no warranty as to age.

CASE, tried at Spring Term, 1867, of the Superior Court of Davidson, before *Warren, J.*

The plaintiffs declared for deceit, and false warranty in the sale of a slave.

"The evidence was that in February, 1860, the plaintiffs bought a slave from the defendant, and took a bill of sale as follows: Received of March & Hampton two thousand dollars for a negro boy named Allen, twenty-six years old; said negro is warranted sound in mind and in body and the title good: given under my (561) hand and seal (signed) U. H. Phelps. There was also at the time of the sale a verbal affirmation that the slave was 26 years of age. He was, in fact, thirty-four or thirty-five years old at the date of the sale. The plaintiffs were negro-traders and lived near the defendant, and the former owner of the slave for many years, and had as good an opportunity to know the age of the slave as the defendant had. The plaintiff, Hampton, who made the purchase and who wrote the bill of sale, had for five or six years prior to the sale been sheriff of the county, and lived in Lexington, some distance from the residence of the slave. The defendant's father had owned the slave for about a year before the sale. The defendant himself had owned him but a short time.

There was also evidence upon the question of damages, but there was no exception to the instructions of the court upon that part of the case. Nor was there any exception to that part of the charge which related to the first count in the declaration. Upon the count for false warranty plaintiff's counsel contended that the affirmation being shown to be false, the plaintiffs were entitled to a verdict, and that it was not necessary to show that it was false within the defendant's knowledge; and asked the court so to instruct the jury. The court refused to give the instruction in this form, but said that it was not necessary to show that the affirmation was false within the defendant's knowledge, but that a simple false affirmation was not actionable; that it must appear that it was intended and accepted as a warranty, and that upon this part of the case the jury might consider the evidence in relation to the plaintiffs' knowledge or means of knowledge of the age of the slave."

Verdict for defendant. Rule for a new trial discharged. Judgment, and appeal.

Phillips & Battle, for the appellant.

(562) The contract being in writing, it was error for the Judge to leave its construction to the jury. *Brown* v. *Hatton*, 31 N. C., 319; *Banner* v. *Stevens*, 24 N.C., 411; *Young* v. *Jeffreys*, 20 N. C., 216; *Sizemore* v. *Morrow*, 28 N. C., 54; *Ayers* v. *Parks*, 10 N. C., 59. The last case shows besides that the decision to which the jury came was erroneous.

McLean, *contra*, cited *Brittain* v. *Israel*, 10 N. C., 222; *Fields* v. *Rouse*, 48 N. C., 72.

PEARSON, C. J. The case is stated so vaguely that we are unable to see whether his Honor intended to take a distinction between a warranty and an affimation, or, if so, what that distinction is.

If the instrument declared on contained a warranty as to the age of the slave, the plaintiffs were entitled to the instruction asked for, and it was error to leave the question of construction to the jury.

We are entirely satisfied that that instrument does not contain a warranty as to the age of the slave. So far from it, the warranty is confined expressly to the slave's soundness, and to the title. It is perfectly clear that the age is set out as a mere matter of description, like the name "Allen," with which it is put in connection. There is, therefore, no warranty, and this description, if known by the defendant to be false, was ground to support the count for deceit. That count was disposed of satisfactorily, and his Honor ought to have instructed the jury that the second count could not be supported because there was no warranty.

This miscarriage of the judge, however, is cured by the finding of the jury which puts the matter right.

There is no error.

PER CURIAM. Judgment affirmed.

(563)

THE STATE v. JAMES FULFORD.

An indictment for larceny which describes the thing stolen, as "one promissory note issued by the treasury department of the government of the United States for the payment of one dollar," is in that respect sufficient.

(*State v. Dourden*, 12 N. C., 445; *State v. Rout*, 10 N. C., 618, cited and approved.)

LARCENY, tried at Fall Term, 1867, of the Superior Court of Carteret, before *Shipp, J.*

The jury found a special verdict, upon which the court below gave judgment for the defendant, and the Solicitor for the State appealed.

No statement of the facts is required.

Attorney-General, for the State.
No counsel, *contra*

BATTLE, J. As this case has not been argued before us on the part of the defendant, we are not certainly informed upon what ground a judgment upon the special verdict was rendered for him in the court below. We suppose it was because his Honor thought the stolen article was not sufficiently described in the bill of indictment. If our supposition be correct, we think that he was mistaken. In stealing bank notes or other promissory notes of the like kind, it is not necessary to set out an exact copy of the instrument as it is in an indictment for counterfeiting such securities for money. *State* v. *Dourden*, 12 N. C., 445. It is sufficient to describe it as a bank note for so many dollars on a certain bank, of the value of so many dollars. See *State* v. *Rout*, 10 N. C., 618, and the cases therein cited. In the present case the article alleged to have been (564) stolen is described as one promissory note, issued by the Treasury Department of the Government of the United States, for the payment of one dollar, of the value of one dollar," etc. It would undoubtedly have been sufficient, on the authority of the *State* v. *Rout*, *supra*, to have called the note "a treasury note issued," etc., and it seems to us that the description of it as a "promissory note issued," etc., is quite as certain, and as little likely to mislead the court or the jury as to the identity of the thing. Some degree of laxity in the description of bank notes has been allowed, because generally a person from whom a note has been stolen is incapable of giving a very particular description of it. *Commonwealth* v. *Richards*, 1 Mass. Rep., 336.

In our opinion the judgment given in the court below is erroneous, and ought to be reversed, and a judgment rendered on the special verdict for the State.

PER CURIAM. There is error.

Cited: State v. *Thomason*, 71 N. C., 147; *State* v. *Bishop*, 98 N. C., 776.

(565)

FRANCIS E. WINSLOW v. FENNER, LAWRENCE & COMPANY.

Where A & Co. entered into a written contract with B to sell off a stock of goods, and pay the nett proceeds to C, who was a creditor of B: *Held*,

1. That C had no right of action against A & Co. upon the written contract, as, for alleged want of care in choice of customers, for selling upon a credit, etc.
2. That C might sue A & Co. upon the common counts for any nett cash received by him upon the sales.
3. That C could not recover from A & Co. upon the common counts or otherwise, for money due upon sales-on-credit, from individual members of the firm.

ASSUMPSIT, tried before *Barnes, J.*, at Fall Term, 1867, of the Superior Court of Perquimans.

The plaintiff declared in all the common counts, and also upon a written contract, which was as follows:

NORTH CAROLINA—Halifax County.

Know all men by these presents, that we, Fenner Lawrence & Co , of the county aforesaid, have this day agreed with John H Parker and David Gatlin as follows, to-wit: That we, Fenner, Lawrence & Co., have taken in our possession the stock of goods belonging to the said Parker & Gatlin, to be sold on commissions at twelve and a half per cent on the gross amount of sales, the said stock of merchandise to be placed in the storehouse of A. Burgess, in the town of Clarksville, Scotland Neck; the said goods to be at the risk of said Parker & Gatlin, with the proper care of said Fenner, Lawrence & Co.

And if the said goods are not sold by the 1st day of January next, then the said goods, or the remain-
(566) der thereof, are to be delivered over to the said Parker & Gatlin, or their order.

The net proceeds of the sales of said goods, after the twelve and a half per cent has been deducted, are to be paid over to Frank E. Winslow, so far as his claims go against the said stock of goods, to be paid as follows, to-wit: Cotton at 22½ cents per pound, as per agreement; Federal currency (Greenbacks) at the value of the face or par value; and the bank notes of any of the banks of North Carolina at four for one, except the bank of Washington and the bank of Commerce (Newbern), which are to be taken at five for one.

As witness our hands, this the 28th day of June, 1865.

FENNER, LAWRENCE & CO,
D. GATLIN,
JNO. H. PARKER.

Witness: F. BARROW.

The breaches assigned were (1) selling on a credit; (2) selling to insolvent persons; (3) negligence in collecting; and (4) not paying over money when collected.

It was shown that in 1865 the plaintiff contracted to deliver to Parker & Gatlin (above) about seven thousand dollars worth of goods upon certain terms; that they were accordingly delivered, but that upon the purchasers' failing to perform their contract, by consent of both parties and also of Fenner, Lawrence & Co., the goods were delivered to the latter upon the conditions mentioned in the above writing; and that Fenner, Lawrence & Co. (the defendants) made sales, some for cash, which had in part been accounted for with the plaintiff; some upon credit, a part of this being to persons who turned out to be insolvent; and that a part of what was sold upon credit had been sold to individual members of the firm so selling.

His Honor instructed the jury that the defendants were not liable to the plaintiff for selling upon a (567) credit, or for selling to insolvent persons, or for negligence in collecting; but that they were liable for the net cash received (treating as part of such cash what was due by individual members of the firm).

Verdict accordingly. Rule for a new trial discharged. Judgment, and appeal by the plaintiff.

W. A. Moore, for the appellants.
Smith, *contra*.

READE, J. The plaintiff was not a party to the written agreement by the express terms thereof; nor was either of the parties thereto his agent; nor was it for his sole benefit; some one of which things was necessary to enable him to sustain an action thereon. The agreement was between the defendants and Parker & Gatlin. The only relation which the plaintiff sustained to it was that, not by any stipulations with him, but by the stipulations of the defendants with Parker & Gatlin, the defendants were to pay to him, in discharge of his debt against Parker & Gatlin, whatever amount should be realized from the sale of the goods. The undertaking of the defendants was, that they would do something, not for the plaintiff, but for Parker & Gatlin. And for the breach of that undertaking, only Parker & Gatlin could sue.

By the terms of the written agreement, the defendants undertook, expressly (1) to sell the goods, or so much thereof as they could; (2) to pay the proceeds to the plaintiff; and (3) to deliver back the remainder of unsold goods to Parker & Gatlin. And it may be that impliedly, they undertook (1) not to sell on a credit; (2) not to sell to insolvents; (3) or, if they sold on a credit, to use due diligence in collecting. And it may be, that they performed all these undertakings, except the payment of money, to the plaintiff, to the satisfaction of Parker & Gatlin, with whom they made (568) the contract. At least, Parker & Gatlin do not complain; and they only can complain. And this we understand his Honor to have charged the jury.

But the plaintiff's claim for money had and received stands upon a different footing. For it is well settled that if A consents to receive and does receive money for the use of B, A thereby becomes the agent of B, and B may recover it in an action for money had and received.

In so far, therefore, as the defendants agreed to receive and did receive and actually had in hand, money for the plaintiff, to that extent and no farther, were they liable in this action.

The plaintiff had a verdict for all the money which the defendants had received for him; and to this he was entitled. He also had a verdict for the amount of purchases by the individual members for which no money had been received; and to this he was not entitled. But the defendants did not appeal, and therefore the verdict must stand.

There is no error.

PER CURIAM. There is no error.

Cited: White v. *Hunt*, 64 N. C., 498.

(569)

ANN MERRILL v. HEZEKIAH BARNARD *et al.*

1. A mistake in a writ as to the particular Monday in a month upon which the defendant was to appear, held to be immaterial in a case where the bail-bond gave the Monday correctly, and the defendants were not actually misled.
2. The court to which such a writ is returned has power to amend the mistake.

(*Goodman v. Armistead*, 11 N. C., 10, cited and approved.)

MOTIONS, to quash and to amend a writ, heard before *Buxton, J.*, at Fall Term, 1867, of the Superior Court of Madison.

The writ was in trespass. It was tested on the seventh Monday after the fourth Monday in April, 1867, and directed the sheriff to have the defendants "before the Judge of our Superior Court of Law, at the next court to be held for the county of Madison, at the courthouse in Marshall, on the seventh Monday after the fourth Monday in September next, then and there," etc.

The bail bond was for the appearance of the defendants "on the fourth Monday after the fourth Monday in September," which was the correct day for holding the court. The Spring Term is held upon the fourth Monday after the fourth Monday in April.

At the appearance term the defendants moved to quash the writ, for the mistakes committed as to the term at which it was tested, and as to that to which it was returnable. The plaintiff, upon the contrary, moved to amend the writ in those particulars.

His Honor declined to grant the former motion, and permitted the plaintiff to amend as desired. The defendants appealed.

(570) *Merrimon* and *Phillips & Battle*, for the appellants.
No counsel, *contra.*

READE, J. It would have been sufficient if the writ had required the defendants to appear at the next term of the court, without stating when the court would be held. And then it would have been the business of the defendant to find out when the court would be held. The time being fixed by law, and being, besides, a matter of general notoriety, there would have been no occasion for mistake. We are aware that it is usual to state the time in the writ, *i. e.*, the particular Monday on which the court is to be held, and it would not be improper to state the day of the month also, but it is not necessary to state either. It is also usual to state in the attestation clause the term from which it was issued, and the year of American independence, and the year of our Lord, but leaving out or misstating one or both of these would not make the writ void, provided it appeared sufficiently certain from some other description when the writ issued. *Goodman* v. *Armstead*, 11 N. C., 19.

The defendants' bond for appearance was conditioned for their appearance at the proper time; the writ was served more than ten days before court, and they were present in court; so that there was in fact no surprise.

The clerical mistake of misstating the Monday on which the court was to be held was a proper subject of amendment. His Honor had the power to allow the amendment, and there was no error in its exercise.

This will be certified, etc.

PER CURIAM. There is no error.

(571)

THE STATE v. MICHAEL HORAN.

1. Where the thing stolen is, at the time of stealing, in its raw or unmanufactured state, it may be described in an indictment for receiving stolen goods, by its name and as so much thereof in quantity, weight or measure; but if at that time it had been worked up into a specific article, and so remains, it must be described by the name by which such article is generally known.
2. "A cast-iron top of an iron box," which when stolen had been separated from the box, may be well described in an indictment for receiving stolen goods, as one pound of iron, and the fact that it weighed more or less than one pound will make no difference.
3. Where there is no contradiction between two witnesses, the court may so instruct the jury.
4. The court may instruct the jury as to the effect of certain testimony if believed.
5. A verdict finding the defendant "guilty of receiving stolen goods knowing them to have been stolen" is sufficient, without specifying such goods.

(*State v. Godet*, 29 N. C., 210; *State v. Clark*, 30 N. C., 226; *State v. Moore*, 33 N. C., 70; *Reaves v. Poindexter*, 15 N. C., 308; *Henderson v. Crouse*, 52 N. C., 623; *Gaither v. Ferebee*, 60 N. C., 303; *State v. Edmond*, 15 N. C., 340; *State v. Woodley*, 47 N. C., 276, cited and approved.)

INDICTMENT for receiving stolen goods, tried before *Meares, J.*, at December Term, 1867, of the Criminal Court of New Hanover.

The indictment charged the defendant with receiving as stolen, among many specified manufactured articles of brass and iron, "one pound of iron of the value of six pence.

Upon the trial one Divine, a witness for the State, testified that he went with one Sellers (a constable) to search the "junk shop" of the defendant for stolen goods, and that he found there a large quantity of (572) manufactured articles of iron and brass belonging to the Wilmington and Weldon Railroad Company; among other things, a piece of cast iron, which was the top of an iron box; and also two truck brasses, which he found behind the counter and placed in the pile of things which he and Sellers had gathered from various parts of the shop. He also said that whilst collecting these articles he and Sellers were frequently separated, and in different parts of the shop.

Sellers, who was introduced by the defendant, testified that he had the pile of articles which was gathered by himself and Divine, weighed and removed from the shop of the defendant; that they weighed 1,500 pounds, and that if these two truck brasses were in the pile of iron, he did not see them; also that the truck brasses were about the same color as iron.

One Michael Lovell was introduced by the State, and his character was attacked by the defendant, and shown to be bad.

Whilst instructing the jury the court said, in reply to a position taken by the defendant, that it "did not understand Sellers to contradict Divine at all." Also, in commenting upon Lovell's testimony, the court remarked to the jury, amongst other things, that "if they did believe him, it would materially strengthen the evidence for the State." It further instructed them that the description "one pound of iron," in the indictment, was a sufficient identification of the cast iron top of a box spoken of in the testimony.

Verdict for the State. Rule for new trial discharged. Judgment, and appeal.

Person, for the appellant.
Attorney-General, *contra*.

BATTLE, J. We have given the errors assigned by the defendant's counsel in his bill of exceptions, as well as that urged by him in arrest of the judgment (573) for alleged insufficiency in the verdict, the consideration which the importance of the case, both to the State and the defendant, demands. The errors set forth in the bill of exceptions are three in number and we will examine them in the order in which the objections seem to have been made.

1. The first exception appearing upon the record is that the defendant could not be convicted, upon the evi-

dence, of having received as stolen one pound of iron, or, in other words, that the article proved to have been stolen, could not properly be described as one pound of iron. The testimony was that the article was "a piece of cast iron which was the top of an iron box." In the case of the *State* v. *Godet*, 29 N. C., 210, and again in *State* v. *Clark*, 30 N. C., 226, it is said that in an indictment for larceny the article charged to have been stolen must be properly and sufficiently described, so that there may be no doubt of its identity. This is required for the purpose of enabling the court to see that the article is of value; and also for the protection of the accused, by informing him of the distinct charge against him, and furnishing him with the means of showing, if subsequently indicted for the same offence, that he has already been convicted or acquitted of its commission. It is hardly necessary to say that the evidence must correspond with the description of the property mentioned in the indictment. In the application of this rule, some of the cases decided by it may seem too nice and refined for practical use, *e. g.*, where a man was acquitted of a charge of having stolen a pair of stockings, when it was proved that the stockings were odd ones; and when there was an acquittal of having stolen a duck, upon proof that the fowl was a drake. See note *b.* to *Rex* v. *Holloway*, 1 C. & P., 127 (11 C. L., 342).

The following distinction may be taken between the descriptions of the same article in different forms of existence. When in its raw or unmanufactured (574) state it may be described by its name, and as so much in quantity, weight or measure; but if it be worked up into a specific article, and remain so at the time when stolen, it must be described by the name by which such specific article is generally known. Two cases which have been decided may serve to illustrate this distinction. In the case of the *State* v. *Moore*, 33 N. C., 70, it was held that turpentine, which has run into boxes cut into the tree for the purpose of receiving the liquid, is the subject of larceny. But an indictment for stealing two barrels of turpentine can not be proving that the turpentine was stolen by having been dipped out of the boxes, from time to time in small quantities, and then put into barrels. In the other case, *Rex* v. *Holloway*, *above*, it was decided that a charge of stealing a brass furnace was not sustained by proof that the furnace was broken into pieces before it was stolen. In the case now before us the cast iron top of a box, separated from the box to which it belonged has not, so far as we are informed, any distinct name, and may, therefore, well be described as one pound of iron. Whether the top of the box weighed more or less than a pound makes no difference. *State* v. *Moore*, *ubi supra*.

2. The second objection to the charge of the Judge, is for saying that there was no contradiction at all between the testimony of the two witnesses, Divine and Sellers. It is a well established rule that where there is no testimony to a material fact, the Judge may say so, but if there be any at all, he has no right to express an opinion as to its weight. So, if there be an alleged contradiction between the testimony of two witnesses, the court may instruct the jury that there is none, if such be the case; but if there be the least conflict in the different statements it must be left to the jury to decide upon it. In the present case we agree with the Judge that there was no contradiction at all, for under (575) the circumstances the positive statement of Divine as to what he did and saw were not in the slightest degree impugned by what, for the very good reason given by Sellers, may have escaped his attention. In the case of direct conflict in the testimony of witnesses, the Judge must submit it to the jury to decide between their respective claims to credibility *Reeves* v. *Poindexter*, 53 N. C., 308. Where there is affirmative and negative testimony it must be left to the jury, with instructions that the former is entitled to more weight than the latter. *Henderson* v. *Crouse*, 52 N. C., 623. But where the alleged negative testimony becomes so slight that it has no appreciable weight, the court is justified in declaring that there is no contradiction at all.

3. The third exception is also one to the Judge's

charge; for saying to the jury that if they believed the witness, Lovell it would materially strengthen the evidence for the State. This exception is manifestly founded in mistake, for the Judge expressed no opinion upon the weight of the testimony, but only upon its effect if true, which he had a right to do. Lovell had been shown by the defendant to be a man of bad character, and the Judge, after giving very proper instructions by way of caution to the jury, said that if, notwithstanding his bad character, they should believe his testimony to be true, its tendency was to strengthen the other evidence given for the prosecution. This surely was not the expression of an opinion upon the weight of evidence, but only upon its effect if believed. See *Gaither* v. *Ferebee*, 60 N. C., 303 Upon special verdicts and demurrers to evidence the court must necessarily pronounce what the law is upon the facts found or admitted; so in charging a jury the Judge must say what the law is upon the different views which the jury may take of the facts testified to by the witness; in other words, what is the legal effect of the facts which the jury may believe to be established by the testimony.

(576) 4. The motion for an arrest of judgment on account of an alleged imperfection in the verdict, can not be sustained. The objection is that the verdict does not specify what goods the defendant had received, knowing them to have been stolen. It is admitted that the verdict would not have been good, had it simply found the defendant guilty, but the counsel contends that as it professed to set out of what he was guilty, it ought to have stated that it was for receiving the stolen goods mentioned in the indictment, or in some other way to have identified them. In support of his objection the counsel relies upon the *State* v. *Edmund*, 15 N. C., 340, and the *State* v. *Woodley*, 47 N. C., 276. In both of these cases the fatal defect was the omission in the verdict to state the intent with which the felonious act was done, but in neither was the slave, with the carrying, etc., of whom the prisoner was charged,

specified, and no objection was made on that account. In the present case it was unnecessary to mention the intent, and the goods received must be taken to have been those specified in the indictment.

Having examined and considered the record proper, and the bill of exceptions. and found no error in either, we must direct the judgment to be affirmed, and a certificate to that effect to be sent to the Criminal Court for the county of New Hanover.

PER CURIAM. There is no error.

Cited: State v. *Patrick*, 79 N. C., 656; *State* v. *Bragg*, 86 N. C., 690; *State* v. *Barber*, 113 N. C., 715.

(577)

THE STATE v. DANIEL BANKS.

A person may be indicted under Rev. Code, c. 34, s. 20, for stealing a National Bank note.

(*State v. Brown*, 53 N. C., 443, cited, distinguished and approved.)

LARCENY, tried at Fall Term, 1867, of the Superior Court of Guilford, before *Mitchell, J.*

The thing alleged to have been stolen was a National Bank note for ten dollars, issued by the Ocean National Bank of the city of New York. The indictment contained six counts. The first five described the article taken, respectively, as a bank note, an order, an obligation secured by bonds of the United States, a National currency bill, and an obligation (simply), and the sixth called it "a piece of paper of the value of ten dollars, purporting to be a National currency bill."

The defendant having been convicted, moved in arrest of judgment. From the order allowing this motion the Solicitor for the State appealed.

Attorney-General, for the State.
Scott & Scott, contra.

BATTLE, J. The counsel for the defendant admits that if any one count of the indictment can be sustained, the judgment is not to be arrested; but, he contends that they are one and all invalid. His objection to the first five counts is, that the bank whose note, etc., is alleged to have been stolen, is not a bank of any one of the United States, but is a corporation created by an act of the Congress of the United States, ratified the 11th day of July, 1862, and that the stealing (578) of its notes is not forbidden by the Rev. Code, chap. 34, sec. 20. We can not agree with the counsel in his construction of our act. The language is "If any person shall feloniously steal, take and carry away, or take by robbery any bank note, check or order for the payment of money, issued by, or drawn on any bank, or other society or corporation within this State, or within any of the States," etc., "such felonious stealing, taking and carrying away, or taking by robbery, shall be deemed and construed to be felony," etc. In the present case the stolen note was issued by a bank within one of the United States, to-wit, the State of New York, and is therefore within the letter of the act, and there can not be the slightest doubt but that it is also within its spirit and meaning. The act is silent as to the authority by which the bank must be chartered, and the mischief of stealing one of its notes from a *bona fide* holder is the same, whether it derived its existence from an act of Congress or from the Legislature of New York. In the case of the *State* v. *Brown*, 53 N. C., 443, cited and relied upon by the counsel for the defendant, the indictment omitted to mention that the bank note charged to be stolen was issued, by any bank doing business either in this or any other State of the United States, and the judgment was properly arrested on that express ground. As at least one, if not more, of the first five counts of the indictment is good and sufficient, it is unnecessary to notice the sixth count. We think his Honor erred in ordering the judgment to be arrested, and, in consequence of this error, the judgment of the

Superior Court must be reversed, which must be certified as the law directs.

PER CURIAM. There is error.

Cited: State v. *Campbell*, 103 N. C, 346.

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(579)

SAMUEL BUNTING v. THOMAS C. McILHENNY.

The action against the creditor for the jail fees of an insolvent debtor, given by Rev. Code, c. 59, s. 5, to the jailor, can not be maintained by the sheriff as the jailor's principal.

CASE, tried before *Warren, J.*, at Fall Term, 1867, of the Superior Court of New Hanover.

The plaintiff was the sheriff of the county, and one Biddle was keeper of the jail under him, and as such had supplied with food an insolvent debtor who was in prison at the suit of the defendant.

A verdict was entered below for the plaintiff, subject to the opinion of the Judge upon his right to maintain the suit, and with liberty to have a nonsuit entered if that opinion should be in favor of the defendant.

The court, being of opinion with the plaintiff, gave judgment accordingly, and the defendant appealed.

W. A. Wright, for the appellant
Person, contra.

PEARSON, C. J. According to the words of the statute the jailor is to furnish food to the debtor, and he is authorized to sue the creditor for the value of the board so furnished. So no question is made but that the action may be maintained in the name of the jailor.

But it is said the action may also be maintained in the name of the sheriff when, as in this case, the sheriff and jailor are different individuals, and the argument is put on the ground that at common law the jailor is the appointee, the deputy, and mere agent of the sheriff, who, under the rule, *respondeat superior*, is (580) liable for all of his acts of commission or omission, and consequently may sue for whatever he may be entitled to as fees or perquisites of office. This right of the sheriff to sue for the fees or perquisites of office to which his agent, the jailor, is entitled by the common law, may be admitted, but at common law the creditor was not liable for the board of the debtor while in prison. The liability is created by statute, and, of course, the right to sue must depend upon the words of the statute, and can not be extended by reference to the common law. This conclusion is confirmed by the practice under this statute. We find many cases in which the action has been maintained in the name of the jailor, but no case in which the action has been brought in the name of the sheriff. So this is an action of the first impression, and, our conclusion is that it can not be maintained.

The judgment in favor of the plaintiff is set aside, and a judgment of nonsuit on the point of law reserved

PER CURIAM. Judgment for defendant.

(581)

JOHN OLIVER v. B. L. PERRY, Ad'mr, and others.

1. The act of 1866-'7, c. 17, s. 8, which suspends the operation of the statute of limitations, etc., until January 1, 1870, is neither a repeal, alteration nor modification of the ordinance of June 23, 1866, within the meaning of those terms as used in sec. 24 of that ordinance—prohibiting the General Assembly from such action.
2. The provisions of that act prevent suits from abating, by the death of a party and the subsequent lapse of two terms of the court until after January 1, 1870.

MOTION to make the executor of a deceased plaintiff party, heard before *Shipp, J.*, at Fall Term, 1867, of the Superior Court of Jones.

Upon the motion being made, it appeared that the plaintiff had been dead for more than two terms; thereupon his Honor refused to grant it, and adjudged that the suit had abated. The executor of the plaintiff appealed.

Haughton, for the appellant.
No counsel, *contra*.

READE, J. The ordinance of June 23, 1866, "To change the jurisdiction of the courts," etc., provides that the time elapsed since 1st September, 1861, barring actions on suits, or presuming the satisfaction or abandonment of rights, shall not be counted. It also provides that the General Assembly shall have no power to repeal, alter or modify the ordinance. It is insisted that the ordinance restricts the counting of time only up to the date of its passage; and that, after its passage, time might be counted; and that two terms having elapsed without making the executor a party, the suit abated. And such was the opinion of his Honor.

It is insisted, however, for the plaintiff, that, (582) although that would be the true construction of the ordinance, yet the General Assembly extended the provision against counting time up to January, 1870 (Act of 1867, chap. 17, sec. 8), and that, therefore, the suit did not abate. To this it is objected, that the ordinance forbids the General Assembly to do this. And then the plaintiff says: Supposing that to be its import, yet the ordinance, not being organic but only legislative in its character, had no more force than legislation by the General Assembly; and that, therefore, the latter had the power to alter the ordinance notwithstanding the prohibition. Mr. Haughton favored us with an able argument in support of that position. But it is not necessary that we decide it, because we think that the act of the General Assembly in no way conflicts with the ordinance. The ordinance says, in substance, that time shall not be counted up to the date of its passage. It does not say that time shall or shall not be counted after its passage It leaves that as an open question, subject, of course, to legislation. Then the Legislature steps in and says, substantially, that time shall not be counted from the passage of the ordinance up to January, 1870.

We think that the act does not conflict with the ordinance and was not prohibited by it, and that the effect of the act is to prevent the counting of time up to January, 1870, and therefore, that the suit did not abate by the lapse of two terms.

PER CURIAM. There is error.

SUSAN COOKE v. HENRY L. COOKE and others.

1. Upon the Order of General Schofield (April 27, 1865), announcing the subjugation of North Carolina, all persons who had been civil officers in the State ceased to be such *de facto* as well as *de jure.*
2. It is competent for the Legislature by retrospective legislation to give validity to a marriage which is invalid by reason of the non-observance of some solemnity required by statute; *aliter*, where such marriage is a nullity, as for want of consent, etc.
3. A marriage solemnized upon the 15th day of June, 1865, in Wake County by one who during the existence of the Confederate Government had been appointed a justice of the peace, is within the provisions of the ordinance of October 18, 1865, entitled, An ordinance declaring what laws and ordinances are in force, etc., and is rendered valid thereby.

(*Hughes, ex parte, ante*, 57; *Wiley v. Worth, ante*, 171; *Haley v. Haley*, 62 N. C., 180; *S. v. Samuel*, 19 N. C., 177, and *Crump v. Morgan*, 38 N. C., 91, distinguished and approved.)

PETITION FOR DOWER, heard before *Fowle, J.*, at Fall Term, 1867, of the Superior Court of Wake.

It was agreed that the petitioner and the deceased had gone through the forms of matrimony before one William Cox, in Wake County, upon the 15th day of June, 1865. Cox had been appointed a justice of the peace for that county in 1862, and had then been qualified.

The defendants did not admit that an appointment and qualification in 1862 were sufficient to render Cox a justice of the peace; but if they were so, this denied that he had any power to act at the time of this marriage, viz., after the surrender, and proclamations of the President, Provisional Governor, etc.

The above statement presents the only objection made to the petitioner's right of recovery.

His Honor gave judgment *pro forma* in favor of the petitioner, and the defendants appealed.

Bragg and *Haywood*, for the appellant.

(584) 1. The marriage was void.

(*a*) There is no such thing as marriage by consent simply in this State *State* v. *Samuel*, 19 N. C., 177; *State* v. *Bray*, 35 N. C., 289; *State* v. *Patterson*, 24 N. C., 346. See also Shelf M. & D., 5; 2 Rop. H. & W., 474; 1 Scrib. Dower, 616 to 668; *Regina* v. *Millis*, 10 Cl. & Fin , 534.

(*b*) These rites were not celebrated by a lawful officer. Cox never was more than a *de facto* officer of a *de facto* government. When that government ceased to exist, his office came to an end. The proclamation of the President (29 May, 1865), and the Provisional Governor (12 June, 1865), left him without color for his official acts. Hughes' case, *ante*, 57; *Wiley* v. *Worth*, *ante*, 171; *Haley* v *Haley*, 62 N. C., 180. See *Burke* v. *Elliott*, 26 N. C., 355; *Gilliam* v. *Riddick*, 27 N. C., 370; *State* v. *Robbins*, 28 N. C., 23; *Swindell* v. *Warden*, 52 N. C., 578, *King* v. *Bedford Level*, 6 E., 368; 2 Hal. P. C., 24; Cro. Car., 97 (case of demise of the Crown).

2. The ordinance of the 18th October, 1865 (c. xi) does not validate the marriage.

(*a*) The marriage being in itself void, the Convention had no power to render it valid. *State* v. *Pool*, 50 N. C., 105.

(*b*) The ordinance does not cover the case. The words in sec. 3, "purporting to be a law," refer only to laws of the State after secession, and here no such law is relied upon, as the marriage depends only upon a law passed before the war. Section 4 covers only such action as took place whilst the late *de facto* State government was in existence, as is shown by section 6, which ratified the action of the Provisional Governor, one of which acts was (12 June, 1865), to displace civil magistrates.

They also referred to General Schofield's orders of April 27 and 28, 1865.

Phillips & Battle, contra.

(585) 1. The marriage was valid when performed.

Cox was a *de facto* justice of the peace on the 15th of June, 1865. That the government of which he was a part was never more than *de facto*, does not affect the question. A *de jure* government that has come to an end has no more virtue than a *de facto* government under the same circumstances. In either case, it is the conqueror that by his recognition of them confers upon such former officials those functions that are summed up in the phrase *de facto.* For his own purposes in regard to preserving the peace, etc., he may impliedly confer upon them an *exequatur.* The proclamations referred to do not *amove* the officers mentioned. The language is general, but, nevertheless, is to be restrained *ad habititatem rei*, *i. e.*, that, for any political purposes, *ex. gr.*, for those of reconstruction, holding elections (the objects for which the Provisional Governors were appointed), there were no such officers. In accordance with this, it is seen that the proclamation of June 12, 1865, does not confer upon the persons appointed to be justices any other than political functions. They had no power to marry, and therefore their predecessors were not displaced as to that or the like function. In that respect these were left to the doctrines of public law. By that, mere conquest does not remove the civil officers of the conquered as regards every function. Dana's Wheat., sec. 347, n. 2, etc. *Hughes' case*, *Wiley*

v. *Worth*, and *Haley* v. *Haley*, do not go the length now insisted upon, *i. e.*, that the officers do not remain such *de facto* after the surrender. A *de facto* officer has no right to salary, as *ante*, 171; and the general language in Hughes' and Haley's cases is to be restrained to the subject-matter.

Besides, the same government which through the President and Provisional Governor, for political purposes, issued the above proclamations, for other purposes covering the present case, through General Halleck, then commanding Virginia and North Carolina, issued the proclamation of 28th April, 1865, (586) dated at Richmond, Va. The fifth section expressly recognizes magistrates as [*de facto*] officers empowered to celebrate marriage and requires them to take an oath of allegiance. This requirement is only directory. This proclamation remained standing in the official paper at Raleigh for several months; was inserted with the other proclamations above cited, and was standing therein on the day this marriage was performed.

The actual *amotion* of these officers is due to the ordinance of October 19, 1865.

2. The ordinance of the 18th October, 1865, establishes this marriage.

(*a*) The Convention had the power to do so. Sedg. Cons. and Stat. Const., pages 666, 684; 1 Bish. M. & D., sec. 657; and cases there cited.

(*b*) The words include this case. There is no reason for restraining the word "purporting" to the single case stated by the appellants. Various objections were apprehended and a general provision was applied. The words in the fourth section, "which may be done," were intended to include cases thereafter; *i. e.*, may "hereafter be done" throughout the troubles. They were inserted by an amendment.

Pearson, C. J. The counsel for the appellants took these positions:

1. The marriage was void, not having been solemnized in the mode required by law.

2. The Convention had no power to give validity to the marriage.

3. The ordinance of the Convention does not apply to this case.

We admit the first position. The marriage was not valid, on the ground that Cox, who professed to (587) act as a justice of the peace at its solemnization, was not an officer of the State, either *de jure* or *de facto*. After the order of General Schofield, announcing the subjugation of the State, and that it was in the possession of the army of the United States, all of the officers of the State were dead, and could no longer exercise the functions of their respective offices. This is settled in the matter of *Hughes*, *ante*, 57, followed by *Wiley* v. *Worth*, *ante*, 171; *Haley* v. *Haley*, 62 N. C., 180. The idea that after the State attempted to withdraw from the Union, had waged war for four years, and had been subjugated, the officers of the State who had in the meantime disowned their allegiance to the United States, and attorned to the government of the Confederate States, could the next day turn around and say: "We will now discharge the duties of our respective offices, as if nothing had happened," is out of the question. But it is said the State had no right to secede, and consequently was never out of the Union: Agreed; but does it follow that the officers of the State are to occupy their same positions under the new order of things? If the State had a right to secede, and the United States wrongfully waged war to the result of subjugation, it is conceded on all hands that, according to the laws of war, the State was subject to the terms of the conqueror. That the State can be in a better condition, on the supposition that the attempt to secede was wrongful, and the war waged by the United States rightful, is a conclusion upon which no mind, accustomed to legal investigation, can not rest as a proposition of law. So Cox, who was appointed a justice of the peace by the State while a member of the Confederate States, was not, at the time he solemnized this marriage, an officer of the State, and consequently the marriage was not valid. *State* v. *Samuel*, 19 N. C., 177.

2. We are of opinion that the Convention had power to give validity to this marriage. On this distinction: If the marriage be a nullity for the want of the essence of the matter, that is, the consent of one of the parties, as in the case of *Crump* v. *Morgan*, 38 N. C., 91, where, one of the parties being a lunatic, the court decreed a divorce "of nullity of marriage,"—neither a Convention, nor Legislature, nor any other authority has power to make the marriage valid; but if the marriage be invalid by reason of the non-observance of some solemnity which is required by statute, as the presence of a minister of the gospel or a justice of the peace, that want of form may be supplied by an ordinance of a Convention. This conclusion is fully supported by the authorities cited on the argument, and indeed it is so well sustained by the reason of the thing as to need no support. (588)

3. This is the only point about which the court has had much difficulty. I confess that at first I was inclined to the opinion that the case did not fall within the provisions of the ordinance, chap. 11, "An ordinance declaring what laws and ordinances are in force, and for other purposes." It seemed to me that the scope of the ordinance was to give validity to all acts done by the civil officers of the State during the war, and up to the time when the Provisional Governor was inducted into office; and after that time to give validity to all of his acts, and all of the acts of the officers appointed by him, so as to make his induction into office the dividing line, and not to have one set of officers lapping over and encroaching upon the jurisdiction of the other set. But upon further consideration, and in deference to the better judgment of my brothers Battle and Reade, I became fully satisfied that my first view of the ordinance was too narrow, and that by its true construction it does not draw any sharp dividing line between what was done by the civil officers of the State, and what by the officers appointed by the Provisional Governor; for there

had been no collision or contest for jurisdiction (589) between them, and the benign and enlarged purpose of the ordinance was to make valid everything which had been done under any authority purporting to be a law of the State, in like manner and to the same extent as if the State had never attempted to secede, without minding any lapping over into the time of Provisional Government.

In reference to marriages there was good reason for using the broadest terms, as is done in this ordinance; for although in this particular instance, where the marriage was solemnized near the seat of government, there was a chance that the parties had heard of the induction of the Provisional Government, and of his proclamation, and possibly, if well informed, in regard to the consequences of a civil war resulting in subjugation, they might have known that Cox was no longer ajustice of the peace, either *de jure* or *de facto*, still it was apparent to the members of the Convention that this information did not reach the extreme counties of the State for several months, and when it was known, its legal effect was not appreciated This accounts for the general terms: "All marriages solemnized on or since that day," etc , extending the remedy down to the date of the ordinance.

There is no error. Judgment affirmed. This will be certified to the end that further proceedings may be had in the court below.

PER CURIAM. Judgment affirmed.

Cited: *Baity* v. *Cranfield*, 91 N. C., 298; *State* v. *Wilson*, 121 N. C., 656; *Buie* v. *Parker*, 63 N. C., 137; *Boyle* v. *New Bern*, 64 N. C., 664; *Franklin* v. *Vannoy*, 66 N. C., 152.

(590)

DAVID PARKER v. HENRY E. STALLINGS and others.

1. A note payable at, or one day after date, is not within the principle which excepts from the rule as to *bona fide* endorsees for value such as take notes that are overdue.
2. A *bona fide* endorsee for value of a note so payable obtains a good title against all previous parties, although when endorsed it was overdue, and had been obtained by a fraud upon some of those parties, committed by one through whom the endorsee claims title.

(*Haywood v. McNair*, 19 N. C., 283, cited and approved.)

DEBT, tried before *Barnes, J.*, at Fall Term, 1867, of the Superior Court of Perquimans.

The paper sued upon was as follows:

One day after date, with interest from date, we or either of us do promise to pay Henry E. Stallings, or order, the just and full sum of two hundred and eleven dollars and thirty cents, for value received. As witness our hands and seals.

(Signed) JAMES M. STALLINGS. [Seal.]
ASA R. STALLINGS. [Seal.]

Indorsed: "Pay to J. P. Jordan." (Signed) Henry E. Stallings [s]; also, "Pay to D. Parker or order." (Signed) J. P. Jordan [s.]

The suit was brought against all the parties to the paper.

It was shown that Henry E. Stallings had carried the note to Jordan, an attorney, in order to have it collected, and had indorsed it in blank upon being told by Jordan that it was necessary for him to put his name on the back of it to enable the latter to collect it by suit. Jordan afterwards sold the note to the plaintiff, first filling up to himself the indorsement of Stallings, and indorsing the bond himself in blank. This latter indorsement was filled up at the trial. (591) There was no evidence that the plaintiff knew anything of the circumstances under which Stallings had placed his name upon the bond.

The plaintiff objected to the admission of testimony as to what passed at the time when Stallings indorsed the bond; but it was admitted by the court.

His Honor charged the jury that if the evidence satisfied them that Stallings placed his name upon the bond under an impression that it was necessary to enable him to institute suit, and not for the purpose of indorsing it and transferring the title, that was not such an indorsement as rendered him liable.

Verdict accordingly. Rule for new trial discharged. Judgment, and appeal by the plaintiff.

Smith, for the appellant.

1. The case shows an indorsement in fact and a delivery to Jordan, and parol evidence is incompetent to vary or diminish the legal obligations of the contract of indorsement; *ex. gr.*, as here, to show that a general indorser was in fact an indorser without recourse, to the prejudice of a subsequent indorsee without notice and for value. *Marston* v. *Allen*, 8 M. & W., 504.

2. The rules applicable to overdue and dishonored paper, do not apply to an indorsement made after the paper was due, where inquiry would have developed no facts prejudicial to the claim.

3. Every indorsement is presumed in law to have been made before the debt falls due. Byles on Bills (61 L. L., 152).

W. A. Moore, contra.

(592) BATTLE, J. The question presented by the pleadings and bill of exceptions is one of much practical importance, though of no great difficulty. The principle upon which the decision must turn is clearly stated by the Court of Exchequer in the case of *Marston* v. *Allen*, 8 M. & W., 494. It is there said that "the law merchant, for the purpose of currency and the advantages flowing from an unchecked circulation of bills of exchange, no doubt provides that a *bona fide* holder

for value shall not be affected by an intermediate fraud. We do not indeed adopt the proposition that the previous party to the bill is estopped from setting up the defence of fraud against the claim of a *bona fide* holder for value. We think it better to say that, by the law merchant, every person having possession of a bill has (notwithstanding any fraud on his part, either in acquiring or transferring it), full authority to transfer such bill, but with this limitation that, to make such transfer valid, there must be a delivery, either by him or by some subsequent holder of the bill, to some one who receives such bill *bona fide*, and for value received, and who is either himself the holder of it, or a person through whom the holder claims.'' Promissory notes are, by the 3 and 4 Ann in England, and here by our Act of 1762 (Code, chap. 13, sec. 1), assignable and indorsable in like manner as bills of exchange, 2 Bl., 467; and there can be no doubt that the principles above enunciated, as to the transfer of bills of exchange, apply equally to the indorsement of promissory notes. As it appears from the testimony set forth in the bill of exceptions, that the plaintiff took the note in controversy, under the indorsements of the defendants Henry E. Stallings and John P. Jordan, *bona fide*, and for full value paid to Jordan, the last indorsee, he can not be affected by any fraud practiced by Jordan upon the other indorser. The latter, by placing his name upon the back of the note, and handing it to Jordan, enabled him to transfer it to the plaintiff, who, being an (593) innocent purchaser for value, "shall not be affected by an intermediate fraud."

But it is objected further, that the plaintiff received the note from Jordan after it was due, and was, therefore, bound by any defence which was good against Jordan in favor of his indorser. The rule of law thus invoked by the defendant Henry E. Stallings is one which interposes for the protection of the maker, when sued by an indorsee of a note which was overdue when he received it. The ground of it is, that when a note falls due, the maker ought to provide for the payment of it in money or counter demands. "It is a presumption that he will do so, and that he has done so; and after it is due that he has paid it, or is not bound to pay. The dishonor of the note puts every one on his guard, and, he who takes it in that state, without communication with the maker, takes it at his own risk, and ought to stand in the shoes of the former holder. *Haywood* v. *McNair*, 19 N.C., 283. It is manifest that the principle of this defence can not apply as between indorsers and indorsee in a case like the present, where the note was made payable one day after date, with interest from date, and both the indorsements were made after the note became due. It was certain that the parties to the note intended that it might circulate after it was due, and the payee who put it in a situation to be circulated by putting his name on the back of it, ought no more to be protected from the claim of a subsequent *bona fide* purchaser for value than would be the indorser of a bill of exchange not yet due, as against an innocent holder for value. If overdue promissory notes be assignable at all by indorsement, as they undoubtedly are, then the unchecked circulation of them must be upheld by the same principles of policy as we learn from the case of *Marston* v. *Allen* are applied to bills of exchange.

For the reasons stated above, we are of opinion (594) that his Honor erred in admitting the testimony of what passed between the defendants Henry E. Stallings and John P. Jordan, for the purpose of affecting the claim of the plaintiff, and for this error there must be a *venire de novo.* This renders it unnecessary to notice the other points made on the argument by the plaintiff's counsel.

The judgment must be reversed and a new trial ordered.

PER CURIAM. *Venire de novo.*

Cited: Hill v. *Shields*, 81 N. C., 253; *Bradford* v. *Williams*, 91 N. C., 9; *Adrian* v. *McCaskill*, 103 N. C., 187.

(595)

WILLIAM H. SNEED v. WILLIAM M. SMITH.

Where a lost letter was one of many that had passed between a principal and his agent in reference to a matter of business, and its contents were not precisely admitted: *Held*, to be error for the court to take upon itself to state its effect upon the relation between the parties to the correspondence; and that in such case the court with proper observations on the law of agency, revocation, etc., should submit the question of effect, etc., to the decision of the jury.

DETINUE, tried before *Mitchell, J.*, at December (Special) Term, 1867, of the Superior Court of Mecklenburg.

The facts are sufficiently set forth in the opinion.

In the court below there was a verdict for the plaintiff, and the defendant appealed.

Vance and *Merrimon*, for the appellant.

Osborne, and *Phillips & Battle*, *contra.*

READE, J. Stenhouse & McCauley, with whom the books in controversy had been deposited, and who had been sued for them by the present plaintiff, filed their bill in equity against the present plaintiff and defendant, to compel them to interplead and have the title to the books settled, so that they might deliver them to the true owner. Upon the hearing of that case in this court, the facts were so much involved that we were unwilling to decide them. And therefore we directed a trial at law, so that the facts might be passed upon by a jury. The witness, Latta, who made the sale to the defendant, had been the plaintiff's agent for several months during 1864-'65; there had been a good deal of correspondence between the two; the circumstances were embarrassing and dangerous; the books (596) were in jeopardy by the advance of the Federal army; the currency was rapidly depreciating; the expenses were heavy; and communication through the mail was slow and uncertain. There seems to be no question about the agency of Latta up to 11th December, 1864. Some short time thereafter, and probably in the month of December, he received a letter from the plaintiff, complaining of the expense of moving the books, and instructing him to put them into the hands of some responsible commission or auction house for sale, and forward him the money as fast as he could collect. He endeavored to comply with this request, but owing to the general alarm, could not. The letter is lost, and the witness, Latta, stated his recollection of the contents, and that he did not understand it as terminating his agency, but only as advising a means of effecting a sale. Subsequently to the lost letter, they continued their correspondence; and on the 17th of January, 1865, the agent wrote to plaintiff to ask him if he was still inclined to sell, and to inquire as to the price. On the 12th January, 1865, the plaintiff replied, limiting the price to $30 per volume, but sent in the letter a script authorizing him to take $20 per volume, counting all the volumes, etc. Subsequently, and after the agent had made the contract, but before the delivery, the plaintiff wrote to the agent that if he had not completed the sale, not to do it; and if he had completed it and could get off honorably, to do so.

This state of facts is substantially that in the equity suit—that which we thought could be passed upon by the jury better than by us. There was no conclusion from them which seemed to us to be evident. If it had been proper to take out any single isolated fact, and make it decisive of the case, we could have done that without hesitation. That is what his Honor did on the trial. Nothing was left to the jury. His Honor said, that the lost letter was a revocation of the agency, (597) and was decisive of the case. In this we think there was error. If the letter had been before his Honor or its contents precisely admitted, and there had been nothing else between the plaintiff and his agent, its construction would have been a question of law. But where the contents of a letter can be only imperfectly stated, and is one of many passing between the parties upon the same subject, before and after, and each to be explained by reference to the others, and in connection with the whole transaction, the contents and bearing of the letter ought to be left to the jury. And so, their attention ought to have been called to the plaintiff's letter of 12th January, in which he fixes the price, and to his subsequent letter, in which he requests him not to complete the sale, etc.

With proper instructions as to what constituted an agency and what would amount to a revocation, not only so far as the principal and agent were concerned, but also with reference to third persons, the facts ought to have been left with the jury. The attention of the jury ought also to have been called to the question of the *bona fides* of the conduct of the agent and of the parties; and also, as to whether there was any recognition of the agency, or affirmation of the sale of the plaintiff, after the alleged revocation.

There is error.

PER CURIAM. *Venire de novo.*

(598)

M. CHANDLER v. WILLIAM HOLLAND and another.

Where the owner of a slave hired her out for the year 1865 for a share of the crop, and such share was delivered to him: *Held*, that no question as to the rights of the slave to the product of her labor after emancipation, could be raised in defence to an action of *trover* brought by the owner against persons who, claiming under a sale from the slave, converted the share so set apart.

TROVER, for forty-one bushels of corn, tried before *Gilliam, J.*, at Fall Term, 1867, of the Superior Court of Cleveland.

The defendant pleaded, General Issue, and "Two military orders issued by officers of the Freedmen's Bureau at Morganton," but the orders were not set out nor their contents stated in the record which was transmitted to the Supreme Court.

The evidence for the plaintiff showed that in 1864 he had hired to one Jenkins a female slave for the year 1865, and was to receive as consideration for her labor one-fourth part of the corn made by Jenkins. The woman remained with Jenkins up to the time of getting the crop in the fall of 1865. At that time the plaintiff claimed the corn of Jenkins, not only because of the contract, but because during 1865 he had supported two children of the woman that were too young to support themselves. There was also evidence to show that Jenkins measured out one-fourth of the corn and placed it in a crib on the premises, and delivered it to the plaintiff, and that the defendants hauled off about one-half of it, converting it to their own use.

Evidence for the defendants showed that they had bought the corn of the negro woman, who claimed that she, and not the plaintiff, was entitled to it; also that Jenkins did not deliver the corn to the plaintiff, (599) but placed it in the crib, that he and the woman might settle the claim to it between themselves.

Two military orders were also offered, and admitted in evidence. Jenkins died shortly before the alleged conversion.

The court instructed the jury that the woman was emancipated by the military proclamation in April, 1865, and was therefore entitled to be paid for her labor from that period; but that neither she nor the plaintiff acquired any property in the corn in dispute until a particular portion of it had been separated from the bulk of the crop, and had been set apart to one of them; that if the evidence satisfied them that Jenkins had chosen to set the corn in question apart for the plaintiff, and had delivered it to him, and that the defendants afterwards had converted it to their own use, the plaintiff was entitled to recover, otherwise not. Also, that the military orders in evidence were no bar to that right.

Verdict for the plaintiff. Rule for a new trial discharged. Judgment, and appeal.

Bynum, for the appellants.
Merrimon, *contra.*

READE, J. His Honor's charge, that the plaintiff must show a right of property and a right of possession in himself, and a conversion by the defendants, was all that the defendants could ask for upon that part of the case.

The defence, that the woman whose services for the year 1865 were the consideration for the contract between the plaintiff and Jenkins, was emancipated during the year, might have been a proper subject for consideration if Jenkins were insisting upon it. But he made no such objection, but, on the contrary, set apart one-fourth of the corn as he had agreed, and delivered it to the plaintiff—and the defendants thereupon (600) took it out of his possession. It is true that they say that they bought it of the negro woman, and that she, having been emancipated during the year, was entitled to the product of her own labor. Suppose this to be true, still his Honor gave them all the benefit of it, by stating in his charge that she was entitled to be paid for her services after her emancipation. The question, From whom was she so entitled to receive pay, remains to be answered. Not from the plaintiff, because she had not served him; but from Jenkins, whom she had served. If she was entitled to a part of the crop, her claim was upon Jenkins; and she had no claim upon that one fourth part which had been allotted to the plaintiff. Therefore, if the defendants had any claim upon the crop on account of her share, it was upon Jenkins, and not upon the plaintiff.

And so the military orders, if they had any operation at all (of which we know nothing, as they are not set out; supposing them, however, as was suggested, to have been orders to Jenkins to pay to the woman a part of the crop), do not vary the case. If the plaintiff had taken all of the crop, there might have been some show of right in the defendants. But three-fourths of the crop were left; and the plaintiff, to show that he was not acting unconscientiously, offered evidence that he had supported two of the woman's children, after her emancipation.

There is no error.

PER CURIAM Judgment affirmed.

(601)

Doe on dem. of JAMES M. KERR v. R. W. ELLIOTT.

If the person who claims under the elder title, have no actual possession of a *lappage*, such possession, although for a part only by him who has the junior title continued for seven years, will confer a valid title for the whole.

EJECTMENT, tried before *Mitchell, J.*, at December (Special) Term, 1867, of the Superior Court of Mecklenburg.

The elder title to the land in dispute was in the plaintiff; and the land was a lappage between his southern line (D S E) and the northern line (N O) of the defendant. In 1842 one Orr, who then claimed the tract now owned by the defendant, conveyed it to one Frazier by a deed which covered the lappage; and on the 11th of December, 1848, the defendant purchased the tract (with the same extent) of Frazier, taking at first a bond for the title, and in 1852 a conveyance.

On the plats (used in the trial below), immediately north of D S E, were dots representing a narrow space of cleared ground adjoining D S E. Two witnesses who were called for the defendant testified that they were not certain, to their own knowledge, of the location of the line D S E, but that the defendant, as soon as he purchased, viz., in December, 1848, took possession immediately north of the cleared ground; that his possession was continued and extended north to and along the line N O before the commencement of this suit.

The court instructed the jury, that if the evidence of these witnesses was believed by them, the defendant was entitled to a verdict; and there was a verdict accordingly.

Rule for a new trial "on the ground that the two witnesses did not know with certainty the location of the said line D S E, and that their evidence did not (602) with sufficient certainty locate the commencement of the defendant's possession." Rule discharged. Judgment, and appeal by the plaintiff.

Osborne and *Boyden*, for the appellant.
J. H. Wilson, *contra*.

PEARSON, C. J. The survey shows that the cleared ground as indicated by "the dots" was north and inside of the line of the defendant D S E, and that the defendant, as soon as he purchased, in December, 1848, took possession immediately north of the cleared ground, and this possession, according to the evidence, was continued and extended from time to time north to the line N O.

So the defendant, ever since December, 1848, has had a possession inside of the lappage which exposed him to an action, and consequently ripened his title after seven years adverse possession under the deed. The fact that he from time to time extended his possession, that is, took in more land, does not at all affect the question; and the matter is too plain to admit of discussion.

There is no error.

PER CURIAM Judgment affirmed.

INDEX.

ABATEMENT OF SUITS.

1. Where a party to a suit had died in June, 1864: *Held*, that under the ordinance of the Convention (23d June, 1866,) providing that the time which had elapsed since September 1, 1861, should not be counted for the purpose of barring neither a *repeal,alteration nor modification* of the ordinance rights, a judgment given at Fall Term, 1866, that such suit had *abated*, was erroneous. *Morris v. Avery*, 238.
2. The Ordinance of the 23rd June, 1866, which changed the jurisdiction of the Courts, prevented an action from abating before or at Fall Term, 1866, by the death of a defendant in 1864 after the Fall Term of that year. *Den v. Love*, 435.
3. The act of 1866-'7, c. 17, s. 8, which suspends the operation of the statute of limitations, etc., until January 1, 1870, is neither a *repeal, alteration nor modification* of the ordinance of June 23, 1866, within the meaning of those terms as used in Sec. 24 of that ordinance, prohibiting the General Assembly from such action. *Oliver v. Perry*, 581.
4. The provisions of that act prevent suits from abating by the death of a party and the subsequent lapse of two terms of the Court, until after January 1, 1870, *Ibid.*

See KILLING—ACTION FOR.

ABATEMENT—PLEA IN.

A plea in abatement is the proper mode of taking advantage of a defect in the affidavit for an attachment. *Barry v. Sinclair*, 7.

See JURISDICTION.

ACCESSORY AND PRINCIPAL.

See EVIDENCE 19; HOMICIDE 2; CRIM. PROCEEDINGS, 10, 11.

ACTION.

1. A cause of action on bank bills does not accrue until a demand and refusal; and such bills bear interest only from the time of demand and refusal. *Crawford v. Bank of Wilmington*, 136.
2. Where A & Co. entered into a written contract with B to sell off a stock of goods and pay the nett proceeds to C, who was a creditor of B: *Held*,
   (a) That C had no right of action against A & Co. upon the written contract, *as*, for alleged want of care in choice of customers, for selling upon a credit, etc.
   (b) That C might sue A & Co. upon the common counts, for any nett cash received by him upon the sales.
   (c) That C could not recover from A & Co. upon the common counts or otherwise, for money due upon sales-on-credit from individual members of the firm. *Winslow v. Lawrence*, 565.

ACTION—CONTINUED.

3. The action against the creditor for the jail fees of an insolvent debtor, given by Rev. Code, c. 50, s. 5 to the jailor, can not be maintained by the Sheriff as the jailor's principal. *Bunting v. McIlhenny*, 579.

ADVANCEMENT.

1. A conveyance of land to a son-in-law is not to be reckoned as an advancement to the daughter, who at the death of her father is married to a second husband. *Banks v. Shannonhouse*, 284.
2. A gift of slaves accompanied by a *warranty* of the title *forever*, (made some years before the late war,) constitutes an advancement *of the value of them when given*, without reference to their subsequent emancipation by the results of the war. *Ibid.*

AGENCY.

An auctioneer is the agent of both seller and purchaser. *Cherry v. Long*, 466.

See STAT. FRAUDS.

AMBIGUITIES.

See APPEAL.

AMENDMENT.

1. Even after final judgment has been entered, a Court has power, at any time during the same term, to amend the proceedings in a suit. *Penny v. Smith*, 35.
2. *Therefore*, where a petition had been dismissed, and the petitioner had prayed for and obtained an appeal from the order: *Held*, that the County Court had power during the same term, to allow the petition to be amended, *also*, that the terms, upon which such allowance was made, was a matter exclusively within its discretion. *Ibid.*
3. Where the affidavit and process in a case of original attachment described a defendant as "C. E. Thorburn," his name in full being "Charles E. Thorburn," *held*, that the Court below might, at any time before final judgment, allow the plaintiff to amend the proceedings by substituting the latter name for the former. *Hall v. Thorburn*, 159.
4. The note upon which the suit had been brought being signed "C. E. Thorburn," *qure* whether the amendment was necessary. *Ibid.*
5. Where a constable had levied an execution on land and returned the same to the County Court, and from an order in that court overruling a motion for a *vendi exponae* the plaintiff appealed: *Held*, that the whole record was carried up, and the Superior Court had no power upon motion, made there for the first time, to allow the constable to amend his return. *Stancill v. Branch*, 217.
6. A mistake in a writ as to the particular *Monday* in a month upon which the defendant was to appear, *held* to be immaterial in a case where the bail bond gave the Monday cor-

AMENDMENT—Continued.

rectly, and the defendants were not actually misled. *Merrill v. Barnard*, 569.

7. The Court to which such a writ is returned has power to amend the mistake. *Ibid.*

8. An affidavit amended by order of the Court must be re-sworn to after amendment, or it will be considered as no affidavit. *Atlantic Bank v. Frankford*, 199.

See Practice, 13.

AMNESTY.

1. The Supreme Court will look into the merits of a prosecution coming within the scope of the act of 1866-'7, c. 3, entitled "An act granting a general amnesty and pardon of all officers and soldiers," etc., so far as to ascertain whether the defendants are clearly entitled to an acquittal. If so entitled a new trial will be granted that they may save costs; it will not be granted if their innocence is doubtful. *State v. Blalock*, 242.

2. By *Reade, J.*, the distinction between pardon and amnesty discussed and stated: A pardon is granted, usually by the executive, to one who *is* guilty, either before or after conviction; amnesty, by the Legislature, to those who *may be* guilty, generally in classes and before trial. *Ibid.*

3. The act of 1866-'7, c. 3, includes both amnesty and pardon, and the Court will place a liberal construction upon its terms, that its benefits may be extended to as many as possible. *Ibid.*

4. The amnesty act of 1866-'7, c. 3, was not intended to exempt soldiers from punishment *because they were soldiers*, but only for *acts committed by them as soldiers; State v. Cook*, 536.

5. *Therefore*, where the prisoner was charged with breaking a dwelling house and stealing a watch, money, etc., and he failed to show that he acted under military orders or in the discharge of a military duty, the fact that he was a soldier was *held* so be no bar to a prosecution for *burglary*. *Ibid.*

APPEAL.

1. Upon ambiguities in the *statement* sent up to the Supreme Court, the presumption will be against the appellant. *Wood v. Sawyer*, 251. S. P. *Weaver v. Parker*, 479, *Davis v. Shaver*, 18.

2. Defendants have a right to *appeal* from an interlocutory order of the County Court appointing four freeholders to view, lay o ffand value land for a mill site, under Rev. Code, c. 71, s. 1. *Minor v. Harris*, 322.

See Forcible Entry, 1, 4; Practice, 4.

APPEARANCE.

See Practice, 11.

APPRENTICE.

1. An illegitimate free negro child who has not gained a new settlement by *a year's residence* in some other county, is, for the purpose of being apprenticed, subject to the jurisdiction of the Court of that county in which its mother was *settled* at the time of its birth. *Ferrell v. Boykin*, 9.
2. A master may recover damages of anyone who, after demand made, detains his apprentice. *Ibid.*
3. A County Court has no power to bind as apprentices, persons who have no notice of the proceedings for that purpose; and it is *prudent* in the Court to *require* that such persons shall be present when bound. *In the matter of Ambrose*, 91.
4. A County Court upon application by the master to whom it has bound an apprentice, has power, and in a fit case it is its duty, to restore to his possession such apprentice if at the time of application a runaway. *Beard v. Hudson*, 180.
5. Discussion and statement of the relation between the Court upon one hand, and the master and the apprentice upon the other. *Ibid.*

See Habeas Corpus, 2.

ARBITRATION AND AWARD.

1. An award of arbitrators, to whom a case of trespass, *q. c. f.* was referred, that there was "no trespass," enables the Court to dispose of the case, and should not be set aside for uncertainty. *Harralson v. Pleasants*, 365.
2. When an award fails to dispose of the costs, each party must pay his own costs. *Ibid.*

See Evidence, 31.

ASSAULT.

1. Where an offer to strike is made with *a deadly weapon* the law does not allow it to be explained by words used at the time. *State v. Myerfield*, 108.
2. *Therefore*, where the defendant, whilst standing in the door of his grocery, held a pistol in his hand sometimes bearing upon A and sometimes not, and swearing that if A came in he would shoot him, *Held*, that he was guilty of an assault. *Ibid.*
3. Discussion of the distinction between "attempts to strike" and "offers to strike," and between the effect of words used where an "offer to strike" is made with a *deadly weapon*, or without one. *Ibid.*
4. An indiscriminate assault upon several persons is an assault upon each. *State v. Merritt*, 134.
5. The facts being that gun was fired by one of two defendants, whilst the other was present aiding and abetting, *Held*, that a charge in the indictment that both committed the assault was thereby made good. *Ibid.*
6. A mere threat unaccompanied by an offer or attempt to strike, is not an assault. *State v. Mooney*, 434.
7. An indictment charging that the defendant and another "did

ASSAULT—Continued.

commit an *affray* by fighting together by mutual and common consent in public view," includes a charge of a mutual assault and battery, and the defendant may be convicted under it, though the grand jury found the bill *not true* as to the other party. *State v. Wilson*, 237.

8. Where one was indicted for an assault and battery, and it was proved that, in a former indictment against him and others for a riot, the assault charged had been given in evidence, with other acts of like character, his conviction of the riot was *held* to be a bar to the second prosecution. *State v. Lindsay*, 468.

See Husband and Wife; Evidence, 14, 15.

ASSUMPSIT.

A creditor having desisted from suing his debtor upon request by a third person to that effect, the latter adding "He has put property in my hands to pay his debts, and when I sell it I will pay you all he owes you," *held* that an action of assumprit could not be maintained against such person, without showing that he had received *money* from the property in his hands. *Hicks v. Critcher*, 353.

ATTACHMENT—JUDICIAL.

A Court has no power to grant a judicial attachment after a return of "not found" made upon a writ issued against a non-resident; and where under these circumstances such a writ had been taken out, *held* that it was the duty of the Court to dismiss it on motion made *by* or *for* the defendant, or even *ex mero motu*. *Deaver v. Keith*, 428.

ATTACHMENT—ORIGINAL.

1. A bond *payable to the plaintiff* in an attachment, and conditioned for the appearance of the defendant, etc., is not a "bail bond," within the meaning of the Rev. Code, c. 7, s. 5, and therefore, by executing such a bond the defendant does not obtain a right to replevy and plead. *Barry v. Sinclair*, 7.

2. The statute upon attachment must be construed strictly. *Ibid.*

3. A plea in abatement is the proper mode of taking advantage of a defect in the affidavit for an attachment. *Ibid.*

4. The creditor's affidavit under Rev. Code, c. 7, s. 1, must state that the removal or the absence from the county or State, or the concealment, on the part of the debtor, was for the *purpose* of avoiding service of ordinary process. *Leak v. Moorman*, 168.

5. An attachment issued by the Clerk of a Court for a sum within the jurisdiction of the Court and made returnable to the proper term of the Court, will not be dismissed for want of form because directed "to any Constable or other lawful officer to execute and return within thirty days, (Sundays excepted)," it appearing that it was executed by the *Sheriff*. *Askew v. Stevenson*, 288.

ATTACHMENT—ORIGINAL—Continued.

6. Where Court was not held at the return term of an attachment, nor at the succeeding term, and at a subsequent term the defendant replevied the property attached, *Held* that the cause was not discontinued. *Ibid.*
7. After replevying, the defendant in an original attachment has a right to demand a declaration from the plaintiff. *Maxwell v. McBrayer*, 527.
8. A suit for breach of promise of marriage can not be commonced by original attachment. *Ibid.*

ATTACHMENT FOR CONTEMPT.

1. One who has been committed under an attachment for not paying a sum of money to a party as ordered, can be discharged only by payment, or by resorting to the relief given by the insolvent debtor's act. *Wood v. Wood*, 538.
2. The act of 1866-'7, abolishing imprisonment for debt, does not embrace cases of commitment under attachment for a failure to comply with an order of Court. *Ibid.*

ATTORNEY.

1. After an attorney has been admitted by the Court to represent a party, he can not unless with the consent of the Court be discharged before the end of the suit. *Walton v. Sugg*, 98.
2. A suit does not end before complete satisfaction of, or discharge from, the judgment given therein. *Ibid.*

See Costs, 2.

BAIL BOND.

See Attachment—Original, 1.

BAILMENT.

The rule that possession is *prima facie* evidence of property has no application to a case where *bailment* is admitted. *Lutz v. Yount*, 367.

See Common Carriers.

BANKS.

1. A bank which in 1860 gave to a depositor a certificate setting forth that he had deposited a certain sum "in current notes of the different banks of the State," and that the sum deposited is "payable in like current notes to the depositor or to his order on return of the certificate," is liable for the whole amount, with interest from the date of the demand, in currency of the United States. *Fort v. Bank of Cape Fear*, 417.
2. A cause of action on bank bills does not accrue until a demand and refusal. *Crawford v. Bank of Wilmington*, 136.
3. Bank bills bear interest only from the time of demand and refusal. *Ibid.*

See Construction of Contracts.

INDEX.

BASTARDY.

1. A colored woman, the mother of a bastard child, has such an *interest* in proceedings in bastardy, within the meaning of the act of 1866, c. 40, s. 9, as to render her a competent witness against a white man, whom she alleges to be the father. *State v. Henderson*, 229.
2. It is not necessary for proceedings in Bastardy to show affirmatively that the mother of the child was a single woman. *State v. Allison*, 346.
3. In cases of bastardy the county of the mother's "settlement" and not that of her "domicil" is chargeable with the maintenance of the child, and settlement is gained only by a continuous residence of twelve months. *State v. Elam*, 460.
4. Therefore, where the mother, having lived in Granville County for several years, removed to Franklin two or three months before the birth of the child with a *bona fide* intention of changing her domicil, the former and not the latter county had jurisdiction of proceedings to charge the putative father. *Ibid.*

BILL OF EXCEPTIONS.

See Appeal.

BONDS.

1. A bond given in January, 1867, for the hire of slaves during that year is subject to no deduction on account of Emancipation. *Woodfin v. Sluder*, 200.
2. The *value* of a bond or note within the meaning of Rev. Code, ch. 31, sec. 38, is the principal and interest due on it. *Ausley v. Alderman*, 215.
3. When the value of a note is reduced by endorsed credits to less than $100, an action brought to the County or Superior Court on such note, may be abated on plea of the defendant. *Ibid.*

See Evidence, 6, 7.

BURGLARY.

Where a prisoner in the night time knocked at the door of a dwelling house, and on being challenged from within gave his name in a feigned voice as that of a friend, and thus obtained immediate admittance, and then committed a robbery, *Held* to be burglary. *State v. Johnson*, 186.

CARTWAY.

The record of an order made in a County Court for laying out a cartway recited—"seven justices being present"—*without giving their names; held* that such record was fatally defective, and the order void. *Link v. Brooks*, 499.

CASES DOUBTED, ETC.

State *v.* Beatty, 61 N. C., 52—*State v. Minton*, 196. McKerall *v.* Cheek, 9 N. C., 343—*McArthur v. Johnson*, 317. Irby *v.* Wilson, 21 N. C., 581—*State v. Schlachter*, 520. Brooks *v.* Morgan, 27 N. C., 481—*Minor v. Harris*, 322.

CERTIORARI.

Where a sheriff having first returned an execution "satisfied," afterwards by leave of court, amended the return thus: "Received from the defendant Confederate money for the debt, which the plaintiff refuses to take, therefore the sale is not satisfied, and the same is returned that an *alias* may issue to sell the land;" and then taking out such *alias* levied upon the land. *Held*, that the petition of the defendant in such execution praying for a *certiorari* and *supersedeas*, ought not to have been dismissed, but should have been placed upon the trial-docket. *Atkin v. Mooney*, 31.

CLERK AND MASTER.

1. When a Clerk takes a bond payable six months after date, if the debtor tenders the money at the day, the Clerk is bound to receive it without waiting for an order for collection. *Ibid.*
2. A Clerk and Master who sold slaves under a decree in a petition for partition, and instead of taking bond as a decree directed, received cash, is, with his sureties, liable for the amount so received upon motion for a summary judgment under Rev. Code, c. 78, s. 5; and this, whether an action on the bond would or would not lie for the money as received "by virtue of his office." *Ibid.*
3. By *Pearson, C. J.* A Clerk and Master, who sells under an order to sell upon a credit, has a discretion to take cash instead of bond and security, and is liable to a suit on his bond for such money, as received "by virtue of his office." *Broughton v. Haywood*, 380.

See Title.

COMMON CARRIERS.

It is the duty of a Railroad Company to deliver articles at the *usual* places of delivery. Therefore, where a hogshead of molasses, instead of being landed on a platform the usual place for heavy articles, was lost in an attempt to deliver it to the plaintiff at an unusual and an unfit place, the Company was *held* responsible. *Benbow v. Railroad Co.*, 421.

COMMON COUNTS.

See Action.

CONFEDRATE MONEY.

1. A creditor having, in March, 1863, refused to accept Confederate or State notes for certain contracted before the late war, the debtor brought to him a bond upon a third party for the amount, payable to the creditor, and he agreed to take it in discharge of the debt provided the debtor would sign it as surety. He did so, and the former evidences of indebtedness were cancelled. *Held* that the debtor became a *guarantor* of the bond, and was liable in *assumpsit for the full amount*, without reference to the laws providing for a *scale* of debts contracted during the war. *Carter v. McGehee*, 431.
2. Where a guardian collected a bond due to his ward by solvent persons, in November 1863, nearly two years after the ward

CONFEDERATE MONEY—Continued.

became of age, in Confederate currency, *held* that he was chargeable with *the full amount* of the bond and interest. *Gibbs v. Gibbs*, 471.

See Constitution, 17; Certiorari.

CONFESSIONS.

1. Confessions made a prisoner, a slave, whilst witnessing torture inflicted upon another prisoner for the same offence in order to extort confession from *him*, are not competent evidence. *State v. Lawson*, 47.
2. What amounts to such threats or promises as render confessions inadmissible as being *not voluntary;* what evidence the Judge will hear to establish the fact of threats or promises; and whether there be any evidence to show that the confessions were not voluntary;—are questions of law, and the decision upon them is subject to review in the Supreme Court. Whether the evidence if true proves the fact of threats or promises; whether the witnesses testifying to the court as to such fact are worthy of credit; and in case of conflict which of them is to be believed—are questions of fact for the Judge, and his decision upon them is not subject to review. *State v. Andrew*, 205.
3. Where there was some evidence that the confessions of the prisoner were not voluntary, and in his argument to the jury his counsel for the first time asked the Judge to withdraw them: *Held* to be the duty of the Judge to decide whether the objection to the confessions came too late, and whether the jury should consider them as evidence. *Ibid.*
4. A prisoner in jail said to a fellow prisoner, "If you will not tell on me I will tell you something." The other replied that he would not tell, but if he did it would make no difference, for one criminal could not testify against another. The former added, "I want to know what to do." The other replied that if he knew the circumstances he could tell him what to do: *Held* that confessions of a murder made thereupon by the former to the latter,were admissible in evidence. *State v. Mitchell*, 447.
5. Where one who has been sworn as a witness upon a coroner's inquest and denied all knowledge of the alleged homicide, within three or four hours afterwards was arrested as one of the guilty parties and then proposed to tell what she knew about the homicide and accordingly gave material evidence against herself: *Held* that the confessions were voluntary, and competent evidence afterwards upon her trial for murder. *State v. Wright*, 486.

CONFLICT OF LAWS.

1. Where a marriage has been solemnized according to the laws of another one of the United States, between persons free to marry according to such laws, and the parties afterwards for several years conduct themselves as husband and wife, having children, etc., *it seems* that an indictment for *fornication and adultery* is not the proper method of testing the validity of such marriage. *State v. Schlachter*, 520.

CONFLICT OF LAWS—CONTINUED.

2. A couple domiciled in New York intermarried there in 1856, and subsequently (before 1861) removed to North Carolina; in January 1864, the wife removed again to New York, in December, 1864, she obtained a divorce and in January, 1865, remarried (both acts being in accordance with the laws of New York); afterwards she returned to North Carolina with her second husband and they lived together as man and wife: *Held* that there was nothing in the doctrines *Irby v. Wilson*, 1 D. & B., 568, to impeach such divorce and second marriage, and that it seems that the marriage, being in accordance with the laws of the State where it was solemnized, can not be impeached in the courts of another State. *Ibid.*

See FOREIGN JUDGMENTS.

CONSTABLE.

1. A constable in whose hands a claim was placed for collection on the 16th March, 1861, who took no steps to collect till January, 1863, when he collected in Confederate currency, is responsible after a demand in 1866, for the *full amount* of the claim, notwithstanding the *stay laws* of May and September, 1861. *Lipscomb v. Cheek*, 332.
2. A constable does not subject himself to the penalty of $100 given by the Rev. Code, ch. 34, s. 118, by declining to receive process which *at the time it was tendered* he could not have executed; *ex gr.* process against a person then attending under subpœna before a commissioner. *Fentress v. Brown*, 373.

CONSTITUTION.

1. The tax imposed upon "dead heads" by the act of 1860-'61, ch. 31, sec. 12, is valid. *Gardner v. Hall*, 21.
2. Such a tax is not a "capitation tax," within the meaning of sec. 3, Art. 4, State Constitution (Amendments of 1836); nor is it a violation of the charter of the Wilmington & Charlotte Railroad Company. *Ibid.*
3. A question having been made in the Superior Court as to the constitutionality of an act which gave defendants further time to plead: *Held*, that, inasmuch as the statute had been repealed before judgment was pronounced in this court (especially, as the appeal had already given the defendant all the delay that he asked), the court would not entertain the question merely for the purpose of settling the incidental question of costs. *Burbank v. Williams*, 37.
4. The provisions in the State Constitution for the call of a Convention do not profess to extend to every case in which such a call may be required. *In the matter of Hughes*, 58.
5. The anarchy in North Carolina resulting from the close of the late war, having for the time annulled the provisions under the State Constitution for such a call, it was competent and proper for the United States to afford to the people an opportunity of electing delegates to a Convention. *Ibid.*

CONSTITUTION—CONTINUED.

6. The delegates thus assembled composed a rightful Convention of the people. *Ibid.*
7. The authority of that Convention is not affected by the fact that some of the citizens of the State, not having been then pardoned, were not permitted to vote at the election. *Ibid.*
8. The elections had and the officers chosen by virtue of the ordinances of that Convention, are such *de jure*. *Ibid.*
9. A retrospective law taxing the business of citizens during the whole of the current year in which such law is passed, is not unconstitutional. *State v. Bell*, 75.
10. A law punishing a prospective refusal to render for taxation an account of business done before the passage of the law, is not *ex post facto*. *Ibid.*
11. It was competent for the State in October, 1865, to pass a law taxing business done at any time during that year at any place within its boundaries, even although within what were called "the Federal lines," and at places where there were then no civil officers. *Ibid.*
12. The functions of a court in respect to statutes are but two: 1st, to ascertain their meaning: and, 2d, to decide upon their constitutionality. *Ibid.*
13. Persons *licensed* under the revenue laws of the United States, are not thereby "officers" of the United States, or withdrawn from the operation of the taxing powers of a State. *Ibid.*
14. It is not a ground for arrest of judgment, that the defendant was convicted upon an indictment found by a grand jury in 1863, while the rightful State Government was suspended. *State v. Sears*, 146.
15. An indictment is a *judicial proceeding* within the meaning of the Ordinance of the Convention of 1865, entitled "An Ordinance declaring what laws and ordinances are in force," etc. *Ibid.*
16. The Convention in adopting that ordinance did not exceed its powers; nor is the ordinance in the nature of an *ex post facto* law. *Ibid.*
17. The provisions of the ordinance of October, 1865, in regard to the value of certain executory contracts "solvable in money," do not conflict with the Constitution of the United States. *Woodfin v. Sluder*, 200.
18. The clause of the Ordinance of the Convention of June, 1866, entitled "An Ordinance to change the jurisdiction of the courts" etc., which provided that no *scire facias* should be thereafter issued to revive dormant judgments, and that every *scire facias* then pending should be dismissed at defendants' cost, is not unconstitutional. *Parker v. Shannonhouse*, 200.
19. All retroactive legislation is not unconstitutional. *Hinton v. Hinton*, 410.
20. Retroactive legislation is competent to affect remedies, but not to affect rights. *Ibid.*

CONSTITUTION—CONTINUED.

21. The act of February, 1866, giving widows further time for dissenting, is constitutional, and applies to a case in which at its passage the widow was barred under the act of 1784. *Ibid.*

See EXTRADITION, 1; FOREIGN JUDGMENT, 2; HABEAS CORPUS, 1; REVENUE, 2 to 5.

CONSTRUCTION OF CONTRACTS.

1. "Seventy-one dollars in current bank money," in a bond promising to pay that amount, *held* to mean current bank bills calling on their face for seventy-one dollars. *Lackey v. Miller*, 26.

2. By PEARSON, C. J., *arguendo*, such a bond is not negotiable; and, after the day of payment is past, the proper remedy upon it is *covenant*, in which case the measure of damages would be the value at the time the bond became due of that amount of bank bills, in United States coin. *Ibid.*

See ACTION; BANKS; CONFEDERATE MONEY; DEED, 1, 2; WARRANTY.

CONTRACT.

See ACTION; BANKS.

CORPORATION.

The *return* of a sheriff upon process served on an officer of a corporation, need not designate the office filled by such person. In any event such return is cured by judgment. *Crawford v. Bank of Wilmington*, 136.

COSTS.

1. Costs awarded upon retaxation are virtually included in the original judgment in a cause. *Walton v. Sugg*, 98.

2. *Notice* of retaxation, if necessary at all, may be served upon an attorney in the suit to which the costs are claimed to be incident. *Ibid.*

3. Where several defendants were included in the same indictment, which had been found during the late war and continued until after the courts were reopened; upon a motion to retax costs, *held:*

(a) That the State was entitled to but one *tax*.

(b) That the clerk at each continuance was entitled to but one fee for *continuance*.

(c) That as but one capias, including the names of all the defendants, had been issued, the clerk was entitled to but one fee for *capias*.

(d) That the clerk was entitled to but one fee for *the indictment*.

(e) That he was entitled to a separate fee for *judgment* against each defendant.

(f) That he was not entitled to fees for *subpoenas* issued from term to term; but to only one fee for those originally issued, and to another for those issued at the re-opening of the courts. *State v. Gwynn*, 445.

4. When an award fails to dispose of the *costs*, in the case referred, each party must pay his own costs. *Harralson v. Pleasants*, 365.

CRIMINAL PROCEEDINGS.

1. If pending an appeal in a criminal case, the statute authorizing the indictment is repealed, judgment will be arrested. *State v. Nutt*, 20.
2. It is error in a Judge to give any charge to the jury in the absence of the prisoner. *State v. Blackwelder*, 38.
3. If there be a general verdict of *guilty*, upon an indictment having two counts, judgment can not be arrested because one of those counts is bad. *State v. Beatty*, 52.
4. If one of two repugnant counts is bad, a general verdict of guilty may well be supported by the other. *Ibid.*
5. The proper time for an objection to the grand jury that found an indictment, is before the trial. *State v. Sears*, 146.
6. Whether the doctrine of *reasonable doubt* applies to misdemeanors or not, a charge that to convict the jury must be "fully satisfied" of the defendant's guilt, is all that he has the right to ask. *Ibid.*
7. *Reasonable doubt* is not a *necessary formula*, and it can only be required in any case that the Judge impress upon the jury the principle that the innocent must not be punished. *Ibid.*
8. Upon a trial for *malicious mischief* it is sufficient to charge the jury that they must be "satisfied" as to the ownership of the property injured. *Ibid.*
9. To the rule requiring testimony to be subjected to the *tests* of "an oath" and "cross-examination," there are exceptions arising from necessity. One of these consists of declarations which are part of the *res gestae*. *State v. Dula*, 211.
10. This exception embraces only such declarations as give character to an act, therefore, when the deceased was met a few miles from the place where she was murdered, going in the direction of that place: *Held*, that her declarations in a conversation with the witness, as to where the prisoner was, and that she expected to meet him at the place whither she was going, were not admissible against him. *Ibid.*
11. What facts amount to an agreement to commit a crime by the prisoner and one charged as accessory, so as to render competent the acts and declarations of the alleged accessory, is a question of law, and the decision of the court below upon it is subject to review in the Supreme Court. *Ibid.*
12. So, whether there is *any* evidence of a common design; but, whether the evidence proves the fact of common design, whether the witnesses are worthy of credit, and in case of conflict, what witnesses should be believed by the Judge, are questions of fact for him to decide, and are not liable to review. *Ibid.*
13. Where a defendant was indicted in several counts and found guilty upon two: *Held* to be no ground for arrest of judgment, that one of the two was *defective*, the judgment being such as the court had a right to render on the other. *State v. Tisdale*, 220.
14. Where a Judge charged the jury that they must render a fair and "honest verdict; if they had a reasonable doubt as to

CRIMINAL PROCEEDINGS—Continued.

the guilt of the prisoners it was their duty under the obligations which they had taken, to render a verdict accordingly; but if they were satisfied beyond a reasonable doubt upon the law and the evidence that the prisoners were guilty, and from any false sympathy rendered a verdict of not guilty, that the law said they were perjured men:" *Held* that it was not error. *State v. Fulkerson*, 233.

15. It is not error for the Judge, after he has once charged the jury and they have retired and failed to agree, in proceeding to give further instructions, to refuse to permit more to be said in behalf of the prisoners or the State; though it may be restrictive of our indulgent practice in capital trials. *Ibid.*

16. Although no bill of exceptions be filed and it do not appear that there was any motion in arrest of judgment, the Supreme Court will examine the record to see whether there is any *error*. *State v. Wilson*, 237.

17. An indictment charging that the defendant and another "did commit an *affray* by fighting together by mutual and common consent, in public view," includes a charge of a mutual assault and battery, and the defendant may be convicted under it though the grand jury found the bill *not true* as to the other party. *Ibid.*

18. Although it be error to charge that the doctrine of "reasonable doubt" does not apply in trials for misdemeanors, yet where the instructions taken altogether gave the prisoner the benefit of that doctrine, and informed the jury that they must be "fully satisfied" before convicting, *held* that there was no error. *State v. Knox*, 312.

19. After verdict the defendant can not object that evidence was improperly admitted, if he did not except when it was introduced. *State v. Smith*, 302.

20. There is no ground for arrest of judgment unless a fatal defect appears in the *record proper*, as distinguished from *the statement of the case* by the Judge. *State v. Potter*, 338.

21. The Statute of Ann, allowing a defendant to enter two or more pleas, does not apply to *indictments*. *Ibid.*

22. Evidence making a mere ground for *conjecture* that a homicide was *accidental*, is to be regarded as no evidence. *State v. Haywood*, 376.

23. Upon trials for murder, a killing by the prisoner having been proved, the burden of proof shifts to the prisoner. *Ibid.*

24. When it was shown that the prisoner killed the deceased by shooting, and made his escape, and afterwards said he had killed deceased but did not know that the gun was loaded, the fact that the gun was out of order and would not stand at *half-cock*, did not make it error for the Judge *to refuse* to charge that "if the prisoner was handling the gun in a careless and negligent manner and it accidentally went off, the killing was mitigated to manslaughter," there being no evidence of negligent handling or accident. *Ibid.*

25. A charge upon the subject of insanity in criminal cases commended. *Ibid.*

CRIMINAL PROCEEDINGS—Continued.

26. A special venire having been summoned for the trial of a prisoner, upon a day previous to the day of trial, *held* that a successful challenge by the prisoner to the array of the original panel, did not necessarily affect the competency of the special venire to act as jurors in the case. *State v. Owen*, 425.

27. It is no ground for an arrest of judgment, that the name of the State is omitted in the body of the indictment; or, that the memorandum of the pleas of *two* defendants is prefaced by the word "saith." *State v. Dula*, 437.

28. In the course of selecting a jury for the trial of a capital crime, two persons who had been called and challenged by the prisoner for cause and confessed such cause, in reply to further questions upon the same point by the Court, made disrespectful answers: Held, to have been proper for the Court to rebuke such persons pointedly, and that no rights of the prisoner were infringed thereby. *State v. Hicks*, 441.

29. Under the plea of former conviction, if the acts alleged in the second indictment are embraced in the first, and were relied upon to sustain that indictment and to increase the punishment of the defendant, he is entitled to an acquittal. *State v. Lindsey*, 468.

30. *Therefore*, where one was indicted for an assault and battery, and it was proved that, in a former indictment against him and others for a riot, the assault charged had been given in evidence with other acts of like character, his conviction of the riot is a bar to the second prosecution. *Ibid.*

31. In a case where an indictment for murder was based upon circumstantial evidence tending to show that the homicide had been accompanied by robbery, and the prisoner in whose possession soon afterwards the things taken were found, denied having inflicted the fatal blow, *held* that the presiding Judge was correct in charging that the prisoner was guilty of murder, or of nothing. *State v. Parker*, 473.

32. Where a Judge otherwise administers the law correctly, *held*, not to be error for him to decline using the *very words* in which an important legal proposition has been accurately laid down in another case: and that sometimes circumstances attending a trial may render it *improper* for a Judge to define a legal principle in the very words that were strictly correct in another case. *Ibid.*

33. There is no "formula" to which judges may resort for guaging the degree to which a jury must be convinced in order to justify a verdict of guilty, and attempts to create such have resulted in no good. *Ibid.*

34. Applications for a new trial because a verdict is *against the weight of the evidence*, are addressed to the *discretion* of the judge below, and therefore can not be reviewed by the Supreme Court. *State v. Kearzey*, 481.

35. Petit larceny might at common law be punished by imprisonment. *Ibid.*

CRIMINAL PROCEEDINGS—Continued.

36. It is no ground for a motion to quash an indictment, or to arrest judgment, that the defendant was convicted upon an indictment found by a grand jury in 1863, while the rightful State government was suspended. *Ibid.*

37. One who was ordered into custody to secure the fine and costs in a criminal case having escaped, *held* that it was competent for the Solicitor to have him again arrested that he might be compelled to undergo the sentence; and that the fact that the escape in question was *voluntary* did not alter the rule. *State v. McClure*, 491.

38. It is no ground to quash an indictment, that it was found by a grand jury drawn from a *venire* in which there were no colored freeholders—the jury list, as constituted by the County Court in accordance with the law in force at the time of its constitution, not containing the names of such colored freeholders. *State v. Taylor* and *Knight*, 508.

39. It is no ground of exception that a special *venire* was selected from the freeholders of the county without regard to color, no reference having been had to the jury list constituted by the County Court. *Ibid.*

40. After the testimony for the State is closed and before witnesses for the prisoner are introduced, his counsel has no right, in stating the grounds of defence, to comment at length upon the evidence for the State. *Ibid.*

41. It appearing in this court, upon appeal by a prisoner, that a verdict of guilty had been entered below, the court can not arrest the judgment *because* the judge had not the power to impose the punishment ordered by him, but, as the appeal vacated that judgment, must send the case down for such judgment as the law allows. *State v. Cook*, 536.

42. The Act of 1866-'67, c. 82 (25th February, 1867), which punishes the stealing of mules, etc., with death, did not repeal the law prohibiting that crime previously, except as to offences thereafter committed; therefore where one was convicted at Fall Term, 1867, of stealing a mule, under an indictment found in December, 1866, *held* that the question of punishment was not affected by the Act first mentioned. *State v. Putney*, 543.

43. An indictment for larceny which describes the thing stolen as "one promissory note issued by the Treasury Department of the government of the United States for the payment of one dollar," is in that respect sufficient. *State v. Fulford*, 563.

44. Where there is no contradiction between two witnesses, the court may so instruct the jury. *State v. Horan*, 571.

45. The court may instruct the jury as to the effect of certain testimony *if believed*. *Ibid.*

46. A verdict finding the defendant "guilty *of receiving stolen goods knowing them to have been stolen*" is sufficient, without specifying such goods. *Ibid.*

See Constitution, 14, 15, 16; Extradition.

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DAMAGES.

See Evidence, 14, 15, 16.

DEADLY WEAPON.

See Assault, 1, 2, 3.

DEED.

1. A deed of bargain and sale is not void because of informality, if its terms be such as show the intention of the parties. *Royster v. Royster*, 226.
2. A limitation in a deed of bargain and sale, to one for life with remainder in fee to another, the consideration being expressed to have been paid by the latter, is valid. *Ibid.*
3. The widow of the remainderman in such case, the tenant for life surviving him, is not entitled to dower. *Ibid.*
4. Where one proposed to convey a tract of land in trust and his brother undertook to have the deed drawn, and thereupon, without the knowledge of the vendor, inserted therein a conveyance also *of another tract in trust for himself*, and upon presenting the deed for execution, in reply to a question by the vendor, said that it was "all right," whereupon the latter executed it without reading it, or hearing it read: *Held*, that the conveyance of the second tract was valid *at law*. *McArthur v. Johnson*, 317.
5. Distinction between fraud in the *factum*, and other fraud attending the execution of deeds, stated and applied. *Ibid.*
6. A deed in fee executed in 1859, which contained a memorandum that it was executed instead of a *lost deed* executed in 1854, conveyed all the estate which the vendor had in the land at the time of its execution, and not that only which he had in 1854. *King v. Little*, 484.

See Devise, 6; Evidence, 30.

DEED IN TRUST.

See Purchase for Value.

DELIVERY OF A DEED.

The bargainee in a deed having refused to accept it after it had been acknowledged by the bargainor before a competent officer and a certificate of the acknowledgment appended, a delivery will not be presumed from a subsequent registration, but the *onus* will be upon him who would establish the deed. *Gaither v. Gibson*, 530.

DELIVERY BY COMMON CARRIER.

See Common Carrier.

DEPOSITION.

See Practice, 10.

DEVISE.

1. Where a testator devised—to A, his "plantation between Burnt Coat and Beaver-dam Swamp"—to B, "all that portion of *his* Enfield tract of land lying north of the old road from Old Enfield to Halifax town,"—to others, "all the balance of *his*

DEVISE—Continued.

property, after paying debts;" and afterwards cancelled the devise to A: *Held,* that although the description of the land given to B, would, *per se,* include that given to A, yet, inasmuch as when first written,the testator did not use it in this large sense, such sense could not be imposed upon it by the mere cancellation of the devise to A: *Held also*, that the legal effect of such cancellation was to throw the land given to A, into the residue. *Branch v. Hunter*, 1.

2. The contingency involved in a limitation over upon the death of one "leaving no heirs of his body," can not be determined until the death has occurred. *Isler v. Whitfield*, 493.
3. *Therefore*, where one devised land to a grandson, providing that if he died without an heir of his body it should go over to certain other grandsons and the survivors of them, and in case the last survivor of these died without heirs of his body, then over; *held* that the first taker and the grandsons together could not convey an indefeasible title or fee. *Ibid.*
4. A devise of land to the testator's son and daughter for life, "and then to go to my (testator's) heirs-at-law, and their heirs and assigns forever excluding all those on the part of my (testator's) sister Brooks:" *Held* to pass a contingent remainder to the persons described as "heirs-at-law," as they could be ascertained only after the termination of the particular estate. *Hall v. Want*, 502.
5. *Held* also, that a partition *in fee* under order of court, made between the son and daughter (at that time the testator's only heirs), was no ground for an estoppel to the children of the daughter, who upon the death of the son without issue, their mother having died before, claimed the land under the devise. *Ibid.*
6. *Also*, that a bargain and sale *in fee* by the son, of the part allotted to him under the partition, was without effect upon the remainder. *Ibid.*

DISCONTINUANCE.

See Attachment—Original, 6; Practice, 7.

DISSENT OF WIDOW.

The act of February, 1866, giving widows further time for dissenting, is constitutional, and applies to a case in which at its passage the widow was barred under the act of 1784. *Hinton v. Hinton*, 410.

DIVORCE AND ALIMONY.

1. A petition for divorce because of adultery by the defendant, need not allege that the petitioner has *not* been guilty of adultery. *Edwards v. Edwards*, 534.
2. An order for alimony *pendente lite* creates a debt by record, and may be enforced by either a rule and consequent attachment, or by a *fi. fa.* *Wood v. Wood*, 538.
3. Such order is not necessarily affected by the failure of the petitioner to obtain the relief prayed for in the petition. *Ibid.*

See Conflict of Laws.

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DOWER.

1. The act of 1784 (R. C., c. 118, s. 1); giving widows of testators six months in which to dissent from wills, is not a statute conferring a right of dower, but a "statute of limitations" upon that right, as it existed at common law. *Hinton v. Hinton*, 410.

2. Real estate belonging to a partnership is subject to dower in favor of a widow of one of the partners only so far as a surplus may be left after paying the partnership debts. *Stroud v. Stroud*, 525.

See Deed, 3.

DRAINING LANDS.

A report of commissioners under c. 40 of the Revised Code (Draining Lands), which fails to assess and apportion that part of the labor which, by s. 10, is to be contributed *by the defendants*, is fatally defective. *Brooks v. Tucker*, 309.

EJECTMENT.

1. It is well settled in this State that a vendee of land who enters upon it under a contract of purchase, is a mere *occupant* at the will of the vendor, and that the latter may at any time put an end to such occupancy by demanding possession under a reasonable notice to quit: and that he may then recover in ejectment. Twenty-five days' notice to quit in such case is reasonable. *Butner v. Chaffin*, 497.

2. The state of the accounts between the parties in regard to the purchase-money does not affect the vendor's right to recover possession *at law*, although it might affect his choice of such a remedy rather than that of a bill for specific performance in equity. *Ibid.*

3. An action of ejectment can not be maintained upon a demise laid on a day before the right of entry began; *therefore*, not by a vendor against his vendee (who has failed to comply with the terms of the contract), upon a demise laid upon a day before the demand of possession. *Guess v. McCauley*, 514.

4. It seems that one day's notice to leave is not sufficient. *Ibid.*

5. A mere occupier of land has no estate which upon quitting possession he can transfer to another; and one who goes into possession under such circumstances (without permission of or recognition by the owner) is liable to be treated by him as a trespasser, and to be ejected without a previous notice to quit. *Young v. Perry*, 549.

6. The rule that, in controversies between titles of different dates which lap *actual possession of the lappage* is required to perfect the color of title of the junior claimant, applies to controversies between the State and citizens who claim under mesne conveyances which *extend* the boundaries of the original grant. *Hedrick v. Gobble*, 348.

7. If the person who claims under the elder title, have no actual possession of a lappage, such possession, although for a part only, by him who has the junior title, continued for seven

EJECTMENT—CONTINUED.

years, will confer a valid title for the whole. *Kerr v. Elliott*, 601.

See ENTRY; PRACTICE, 20.

EMANCIPATION.

A bond given in January, 1865, for the hire of slaves during that year, is subject to no deduction on account of Emancipation. *Woodfin v. Sluder*, 200.

See ADVANCEMENT, 2; EVIDENCE, 6, 7, 26; INDICTMENT, 4, 7; TROVER, 3.

EMBLEMENTS.

1. Parol evidence is competent to show that a crop of corn, growing upon land at the time that the latter was conveyed by deed, did not pass by the deed, but was reserved by the vendor. *Flynt v. Conrad*, 190.
2. Distinction in this respect between *fructus industriales* and fruit upon trees, etc., discussed and stated. *Ibid.*

ENDORSEE.

See NEGOTIABLE PAPER.

ENTRY.

1. The lands granted to Henry McCulloch in 1745, are not liable to entry under the provisions of the Rev. Code, c. 42, s. 1. *Doe v. Thomas*, 184.
2. A grant under entry of such lands in 1822 is *void*, and its invalidity may be shown upon question made in an action of ejectment. *Ibid.*

ESTOPPEL.

1. A fictitious sale of a horse to prevent it from being impressed by the Confederate government, will not estop the owner from afterwards asserting his title thereto. *Lutz v. Yount*, 367.
2. The rule that *tort feasors* can not dispute the title of him from whose possession they take the thing in dispute, does not apply where they are sued by such person in *trover*. *Rose v. Coble*, 517.

See DEVISE, 5.

EVIDENCE.

1. Evidence to show that a tract of land of a particular description in a will includes another tract having another description in such will, is competent. *Branch v. Hunter*, 1.
2. Evidence that one in possession of a tract of land declared that he held it as tenant of a certain person, is admissible, even although it be shown that such tenancy was created by a written instrument which is not produced. *Thompson v. Matthews*, 15.
3. A. B., a member of a partnership for farming and tanning, purchased a mule; the purchase was made by A. B. alone, nothing was said of its being for the firm, and there was no

EVIDENCE—Continued.

evidence that the mule had ever been on the joint farm, or in the tannery of the plaintiff's. An action having been brought in the name of the firm for deceit, etc., in the sale; upon a motion to nonsuit; *Held*

(a) That in the absence of other testimony, there was not only some, but plenary evidence of the allegation that the mule was bought for the firm.

(b) That the act of issuing the writ in the name of the firm, raised the presumption that the mule had been bought for it. *Little v. Hamilton*, 29.

4. In order to confirm the evidence of a witness, it is competent to ask whether it does not concur with statements previously made by the witness out of Court. *State v. Marshall*, 49.

5. Previously to the act of 1866 in relation to Evidence, *the* relator in an action brought in the name of the State, was not competent as a witness. *State v. Mangum*, 177.

6. Where a bond for money does not profess to set forth the other terms of the contract in the course of which it was given, parol evidence is competent to establish them. *Woodfin v. Sluder*, 200.

7. *Therefore*, where proclamation was made at a hiring by executors in January, 1865, that such money would be received as would pay the debts of the estate, reference being made specially to a bank debt, *held* that,although no allusion to this was contained in the bonds given for such hires,it was competent for the obligors to show the proclamation, and also the market value of the notes of the bank. *Ibid.*

8. To support an allegation of partial insanity, evidence of strangeness of conduct towards a particular person had been introduced by the caveators; *Held* to be competent for the propounders to show similar conduct towards other persons. *Wood v. Sawyer*, 251.

9. The contents of a paper written by dictation of the testator about two years after he had executed his will, assigning reasons for the particular dispositions of such will, *held* to be competent upon the question of the testator's capacity. *Ibid.*

10. In support of an expert's opinion upon a question of insanity, it is not competent for him to repeat an account which he had received from a monomaniac as to the development of his own disease; or another account related to him by an unprofessional nurse of another insane person. *Ibid.*

11. The testator having in his life-time referred to a certain book as having been printed at his own expense and as giving a correct account of his family, a genealogical table therein is competent evidence of the state of his family at his death. *Wood v. Sawyer*, 251.

12. The course and practice of the Court as to the order in which testimony is to be introduced is well settled, and ought not to be violated except in cases of surprise or mistake as to matters seriously affecting the merits of a cause. *Ibid.*

EVIDENCE—Continued.

13. Proof of the transaction of ordinary business not connected with the matter in regard to which delusion exists is *some* evidence to rebut a presumption raised by proof that such delusion existed a short while before; whether *sufficient* or not, is a matter solely for the jury. *Ibid.*

14. In an action of Trespass for a violent assault and battery, evidence that two weeks before, one of the defendants (who were brothers) had been beaten by the plaintiff, is not competent; nor is it competent to show that several hours before on the same day, the plaintiff had threatened to beat one of the defendants, and that such threat had been communicated to the defendant. *Johnston v. Crawford*, 342.

15. A record of a conviction, and of the payment of the fine and costs incurred under an indictment for an assault and battery, is admissible in mitigation of punitory damages in a civil action for the offense. *Ibid.*

16. In estimating damages in such actions, the jury can take no notice of a sum of money paid into Court for the use of the plaintiff at a former term upon leave granted, the plaintiff having refused to receive it. *Ibid.*

17. A question having arisen in the course of a trial as to an arrangement in regard to a horse which was the subject of controversy, *held* that evidence of a similar arrangement at the same time between the parties in regard to a cow was relevant, either as part of the *res gestae*, or as part of the conversation and thus showing the *entire* arrangement. *Lutz v. Yount*, 367.

18. What was said by a third person in the presence and the hearing of the prisoner may be given in evidence against him. *State v. Ludwick*, 410.

19. The husband of one charged as an accessory is not a competent witness in favor of one charged as the principal felon. *Ibid.*

20. Where two or more persons are on trial under one *indictment* for the same offence, they are by the act of 1866, Ch. 43, competent and compellable to give evidence for or against each other, though one of them can not be a witness for or against himself, or for or against his wife, (and *e converso*, and is not compellable to answer any question tending to criminate himself. *State v. Rose*, 406.

21. Where there is any evidence of an agreement between two or more to compass the death of a third person, the decision of the Court below that such evidence is *sufficient* to establish the agreement, (preliminary to the admission of the acts, etc., of one of such persons as evidence against the other) can not be reviewed in the Supreme Court. *State v. Dula*, 437.

22. Although in investigating the preliminary question as to the agreement evidence of the naked declarations of one of the parties is not competent; yet if such declarations make part of the act charged in the indictment it is otherwise. *Ibid.*

EVIDENCE—Continued.

23. In order to support an exception for the exclusion of certain testimony, such testimony must *appear* to have been relevant. *Ibid.*

24. What one says *in via* as to the place to which he is going, is competent evidence to establish the truth of what he says. *Ibid.*

25. A record of proceedings under the poor debtor law, in favor of one not shown to have been at the time of such proceedings in possession of articles set apart to him, is not admissible as evidence in a suit for those articles, between third persons. *Weaver v. Parker*, 479.

26. A freed woman is a competent witness against a freed man who claimed her as his wife while they were slaves, but since their emancipation has refused to marry her. *State v. Taylor* and *Knight*, 508.

27. Evidence that a prisoner after being committed to jail had opportunity to escape and did not avail himself of it, is not admissible. *Ibid.*

28. The examination of a witness taken before a jury of inquest or an examining magistrate, is inadmissible as evidence in chief, unless it be shown that the witness is dead. *Ibid.*

29. In a case of *murder*, the deceased being a merchant and the evidence against the prisoner being circumstantial, an account book showing entries by the deceased just before the murder, was held admissible as evidence tending to connect the prisoner with the transaction. *Ibid.*

30. The bargainee in a deed having refused to accept it after it had been acknowledged by the bargainor before a competent officer and a certificate of the acknowledgment appended, a delivery will not be presumed from a subsequent registration, but the *onus* will be upon him who would establish the deed. *Gaither v. Gibson*, 530.

31. Where one had been induced to remove from Tennessee and come to this State by a promise of employment and other pecuniary advantages, and after doing so he and the person who made the promise (his sister) quarreled, he inflicted a battery upon her, and she refused to comply with her engagement: *Held*, upon a reference of their "matter in dispute," the sister had a right to introduce testimony as to the battery, for the consideration of the referees. *Walker v. Walker*, 545.

32. A colored woman, the mother of a bastard child, has such an *interest* in proceedings in bastardy, within the meaning of the act of 1866, c. 40, s. 9, as to render her a competent witness against a white man, whom she alleges to be the father. *State v. Henderson*, 229.

See Bailment; Confessions; Criminal Proceedings, 8, 9, 20, 21, 22, 29, 32, 33, 42, 43; Emblements; Judge's Charge, 1; Practice, 10, 12, 13, 22, 23; Rape; Trespass, 3.

EXECUTION.

1. A party has a right to instruct a Sheriff to collect *in specie;* but the latter in the absence of instructions to the contrary, is justified in receiving *currency*, i. e., whatever is passing currently in payment of debts of the character of that which he has to collect. *Atkin v. Mooney*, 31.
2. The "year and a day" mentioned in the Rev. Code, c. 31, s. 100, runs from the issuing, and not from the return of the execution; *Simpson v. Sutton*, 112.
3. *Therefore*, where the former execution had been issued February 14, 1855, a second purporting to be an *alias* issued May 3, 1866, was set aside as irregular. *Ibid.*
4. The right to have an execution set aside, which had been issued before the date to which it had been postponed by an order of record, is personal to the defendant therein. *Shelton v. Fels*, 178.
5. *Therefore*, where, upon the confession of a judgment at June Term, 1866, an entry was made, "Execution stayed by order of plaintiff until after April Term, 1867," and upon the defendant's conveying his property in trust, the plaintiff ordered execution to issue before such term, *held* that the Court would not set aside such execution at the instance of the trustee. *Ibid.*
6. The 5th section of the Ordinance of 1866, entitled An Ordinance to change the jurisdiction of the Courts," etc., does not apply to prevent the issue of a writ of *venditioni exponas*, to enforce a levy upon land made more than a year and a day previously. *Mardre v. Felton*, 279.
7. The 5th section of the Ordinance of 1866, entitled "An Ordinance to change the jurisdiction of the Courts," etc., does not extend to a writ of *scire facias* asking for a *ven. ex. Riddick v. Hinton*, 291.
8. Where a *scire facias* to enforce the levy of an execution had been dismissed in the County Court, *held*, that it was proper for the Superior Court, upon reversing that order, to award a *procedendo*. *Overton v. Abbott*, 293.
9. Where the defendant in an execution had conveyed all his property, real and personal, to a third person, *held* that the plaintiff had a right to direct the officer to levy upon the real estate before the personalty. *Stancill v. Branch*, 306.
10. A defendant may expressly or by implication waive the right to have his personal estate levied upon before his real estate, and a fraudulent conveyance of all his estate will amount to such a waiver. *Ibid.*

See CONSTITUTION, 18; JUDGMENT, 1; MILITARY ORDERS; REVENUE, 6, 7, 8.

EXECUTORS AND ADMINISTRATORS.

1. One who has precedence in a claim for letters of administration loses such right not by delay merely, but by *unreasonable* delay, which is a matter of law. *Hughes v. Pipkin*, 4.
2. Letters of administration having at the first term of the Court been granted to one not primarily entitled, upon application

EXECUTORS AND ADMINISTRATORS—CONTINUED.

at the next term by the person primarily entitled and upon his showing cause for not having applied before, *held* that it was the duty of the Court to set aside the former letters, and to issue letters to the second applicant. *Ibid.*

3. The act of 1846, Ch. 1. (Code, Ch. 46, s. 44,) giving to an executor a right to file a petition to sell real estate, etc., does not apply to a case in which he has full power to sell such estate under a will. *Wiley v. Wiley*, 131.
4. Nor does it apply in such case, even if the executor has by accident *lost* the personal estate of his testator and for that reason alone desires to resort to the realty, his remedy in such case being only in equity. *Ibid.*
5. The remedy provided by the act applies only to cases in which otherwise the creditor would be compelled to resort to a *scire facias* against the heirs. *Ibid.*

EXPERT.

See EVIDENCE, 10; RAPE, 2.

EXTRADITION.

1. The clause in the Constitution of the United States requiring that fugitives from justice charged with treason, felony or other crime, shall be delivered up, etc., is to be construed so as to include acts made criminal by amendments in the laws of the several States, and is not to be limited to such only as are crimes at common law. *In the matter of Hughes*, 58.
2. Where the prisoner had already once been delivered up by the Governor for the crime in question, and thereupon having been allowed bail forfeited his bond, and was again a fugitive, *held*, that it was clearly within the power of the Governor to order a second arrest and surrender. *Ibid.*

FORCIBLE ENTRY.

1. The proceedings for forcible entry and detainer are intended to be summary, and therefore no appeal is given. *Grissett v. Smith*, 164.
2. Anyone aggrieved thereby may have remedy by the writ of *recordari*, by which the defendant may show that the justice was guilty of misconduct or irregularity or may have the benefit of a writ of *false judgment*. *Ibid.*
3. Where the verdict in such proceedings *in respect to the estate of the plaintiff*, was "And we the jurors do hereby decide that the said A. S., plaintiff and owner of said house, etc., do give him full possession of the same;" *held*, that such description was insufficient. *Ibid.*
4. No appeal lies from a judgment given upon an inquisition before a Justice of the Peace, for Forcible Entry and Detainer. *Griffin v. Griffin*, 167.
5. A defendant has no right to claim that a Judge shall suspend action upon a motion that has been made to dismiss such an appeal, in order to allow him to file a petition and affidavit for writs of *certiorari*, *mandamus* and *supersedeas*. *Ibid.*

FORCIBLE ENTRY—Continued.

6. Where upon *recordari* in the Superior Court it appears that the proceedings in an inquisition for forcible entry and detainer before a Justice of the Peace were regular, and the jury found that the relators had an estate in fee simple in the land and were forcibly ejected by the defendant, the writ should be dismissed. *Little v. Martin,* 240.

FORCIBLE TRESPASS.

1. The distinction between Robbery and Forcible Trespass is that in the former a *felonious* intention exists, and in the latter it does not. *State v. Sowls,* 151.
2. By Pearson, C. J. Forcible trespass is the taking of the personal property of another by force; Robbery, the *fraudulent* taking of the personal property of another by force. *Ibid.*
3. In Forcible Trespass it is not necessary that the person from whom the property was taken, should have been actually *put in fear*. *State v. Pearman,* 371.
4. In an indictment for Forcible Trespass it is sufficient to charge, that the defendant entered the premises with a strong hand the prosecutor being then and there present. *State v. Buckner,* 558.
5. Where the land on both sides of a road, whether public or private, belongs to the prosecutor, he is the owner of the soil over which the road runs; and persons who *stop* upon such road and use violent and menacing language to him, are guilty of Forcible Trespass.
6. The only privilege which the public have in a public road is that of passing over it, and those who abuse that privilege become trespassers *ab initio*, and create a nuisance. *Ibid.*

FOREIGN JUDGMENT.

1. Citizens of North Carolina who authorize a suit to be brought in Texas, are *personally* liable for the costs adjudged against them upon their failure in such suit, although they may never have been in that State; and a judgment therefor may be enforced in North Carolina as a valid foreign judgment. *Walton v. Sugg,* 98.
2. In an action upon a judgment given in another State, after it is seen that the person against whom such judgment was given was regularly made a party to that suit, no question can be made whether that Court ought to have rendered such a judgment; but full faith and credit must be given to it. *Ibid.*

See Conflict of Laws, 2.

FORNICATION AND ADULTERY.

See Conflict of Laws.

FRAUD.

A purpose to defraud creditors on the part of the pledgor not participated in by the pledgee, does not affect the pledge. *Rose v. Coble,* 517.

See Deed, 4, 5; Estoppel, 2; Execution, 10; Negotiable Paper; Purchaser for Value.

GUARANTY.

A creditor having in March, 1863, refused to accept Confederate or State notes for certain debts contracted before the late war, the debtor brought to him a bond upon a third party for the amount, payable to the creditor, and he agreed to take it in discharge of the debt provided the debtor would sign it as surety. *He* did so, and the former evidences of indebtedness were cancelled. *Held* that the debtor became a *guarantor* of the bond, and was liable in *assumpsit for the full amount*, without reference to the laws providing for a *scale* of debts contracted during the war. *Carter v. McGehee*, 431.

GUARDIAN AND WARD.

Where a guardian collected a bond due to his ward by solvent persons, in November, 1863, nearly two years after the ward became of age, in Confederate currency, *held* that at the suit of the ward he was chargeable with *the full amount* of the bond, and interest. *Gibbs v. Gibbs*, 471.

HABEAS CORPUS.

1. In deciding questions which arise under writs of *habaes corpus*, the judiciary may review and control the action of the Governor *in regard to points of law;* but can not interfere with such action in regard to any matter *within the discretion* of the Governor. *In the matter of Hughes*, 58.

2. In deciding upon a question of *false imprisonment*, raised under a writ of *habeas corpus*, the Judge may investigate the validity of an order of Court relied upon, as here, to prove the petitioners to be apprentices of him who detains them. *In the matter of Ambrose*, 91.

HIGHWAY.

See Forcible Trespass, 4; Robbery, 1.

HOMICIDE.

1. In a case where the facts were, that the prisoner, a slave, was dancing, singing, and making a considerable noise, with other slaves between the negro-houses and the overseer's house, which were about thirty feet apart; that, upon the overseer, (the deceased,) an elderly man, ordering them to stop the noise, all did except the prisoner, who upon being again ordered to stop, returned an answer which offended the deceased; that the latter replied, "If you say that again, I will mash your mouth," whereupon he repeated the words, dancing the while with his face towards the deceased, but retreating towards the negro-houses; that the deceased then walked towards him with a stick (a deadly weapon) in his hand, and struck him with it upon the head, twice; and thereupon the prisoner wrenched the stick from the deceased and struck him one blow with it with his utmost strength, and fled; the deceased falling, and dying in a few moments: *Held*, that the killing was manslaughter, and not murder. *State v. Brodnax*, 41.

2. If one lay poison for another, and he or a third person take it and death result, it is murder both in the principal and accessories before the fact. *State v. Fulkerson*, 233.

HOMICIDE—Continued.

3. Where one who had been insulted ran a short distance to his house to procure a gun, and then pursued the deceased, (who had ridden of), in order to exact an apology, or failing in that, to do him great bodily harm, or kill him, *held* that, if upon his approach, the deceased turned upon him, putting his hand to his side as if to draw a weapon, and was thereupon killed by a blow of the gun, the prisoner was guilty of murder. *State v. Owen*, 425.
4.. Where the nurse of an infant, knowing that laudanum was poison and likely to kill, gave the child enough to kill it: *Held* (nothing else appearing to qualify the presumption of law) that she was guilty of murder. *State v. Leak*, 450.

HUSBAND AND WIFE.

1. The laws of this State do not recognize *the right of the husband to whip his wife*, but our Courts will not interfere to punish him for moderate correction of her, even if there had been no provocation for it. *State v. Rhodes*, 453.
2. Family government being in its nature as complete in itself as the State government is in itself, the Courts will not attempt to control, or interfere with it, in favor of either party, except in cases where permanent or malicious injury is inflicted or threatened, or the condition of the party is intolerable. *Ibid.*
3. In determining whether the husband has been guilty of an indictable assault and battery upon his wife, the criterion is the effect produced, and not the manner of producing it ,or the instrument used. *Ibid.*

See Advancement, 2; Conflict of Laws; Evidence, 26.

IMPRISONMENT FOR DEBT.

1. The effect of the act of 1866-'7, c. 63, s. 1, is to abolish imprisonment for debt in all cases. *Bunting v. Wright*, 295.
2. Where an issue of fraud on a *ca. sa.* in the County Court was found against the defendant and he appealed to the Superior Court, and upon being called failed to appear, *held*, that the act abolishing imprisonment for debt rendered it proper for the Judge to refuse to give judgment on the appeal bond, it being in this case in the nature of a bail bond. *Ibid.*
3. In such cases, as the law has put an end to the object of litigation, each party must pay his own costs. *Ibid.*
4. One who has been committed under an attachment not paying money as ordered by a Court, can be discharged only by payment, or by resorting to the relief given by the insolvent debtor's act. *Wood v. Wood*, 538.
5. The act of 1866-'7, abolishing imprisonment for debt, does not embrace cases of commitment under attachment for a failure to comply with an order of Court. *Ibid.*

INDICTMENT.

1. An indictment for receiving stolen goods must contain an averment of the person from whom they were received.

INDICTMENT—Continued.

State v. Beasley, 52. (Overruled in *State v. Minton, infra*, 196.)

2. Where the *joining* of two counts is permitted *by statute*, they ought not upon that account to conclude *against the statute. Ibid.*

3. Where an indictment described the article stolen (here *corn*), as being the "property" of the owner, instead of being of his "goods and chattels;" *Held* to be sufficient. *Ibid.*

4. An indictment for larceny, charging the thing stolen as the property of A. B., "a person of color," and concluding at common law, is good. *State v. Stinson*, 195.

5. An indictment for receiving stolen goods of a value less than twelve pence, must conclude *against the form of the statute. State v. Minton*, 196.

6. An indictment for the murder of a person who was a slave at the time of his death, can not be supported unless the fact of his being a slave is set out. *State v. Penland*, 222.

7. What constitutes a sufficient *descriptio personae* in bills of indictment charging offences by or upon persons in the different classes of society, stated by Pearson, C. J. *Ibid.*

8. A stick with which the mortal blow was given may well be described in an indictment for murder, as "a certain stick of no value." *State v. Smith*, 340.

9. Where the thing stolen is at the time of stealing in a raw or unmanufactured state, it may be described in an indictment for receiving stolen goods, by its name and as so much thereof in quantity, weight, or measure, but if at that time it had been worked up into a specific article, and *so remains*, it must be described by the name by which such article is generally known. *State v. Horan*, 571.

10. "A cast iron top of an iron box," which when stolen had been separated from the box, may be well described in an indictment for receiving stolen goods, as *one pound of iron*, and the fact that it weighed more or less than one pound will make no difference. *Ibid.*

See Criminal Proceedings; Forcible Trespass, 2; Rape, 4.

INSANITY.

If a prisoner at the time he committed homicide was in a state to comprehend his relations to other persons, the nature of the act and its criminal character, or if he was conscious of doing wrong at the time he committed the act, he is responsible. But if on the contrary he was under the visitation of God, and could not distinguish between good and evil, and did not know what he did, he is not guilty of any offense against the law; as guilt arises from the mind and wicked will. *State v. Haywood*, 376.

See Evidence, 8, 9, 10, 13.

JUDGE'S CHARGE.

1. Both parties having been introduced as witnesses for the plaintiff, the plaintiff testified to certain language as having

JUDGE'S CHARGE—Continued.

been uttered by the defendant, whilst the latter (upon cross-examination) said "that he did not remember that he ever had any such conversation; that the debtor had never placed any property in his hands, and that he had no property of his in his hands." Upon this the Court instructed the jury, that it was their duty to reconcile contradictions if they reasonably could; that as the testimony of the plaintiff was positive, and that of the defendant "that he did not remember," if they found there was no such agreement, it would be an imputation upon the veracity *of the plaintiff*, whereas if they found that there was, there would be no such imputation upon the veracity *of the defendant*, and in this way their statements might be reconciled, but that it was a matter for them: *Held* that the Court erred therein in intimating an opinion as to a matter of fact. *Hicks v. Critcher*, 353.

2. It having appeared upon the trial that the *note* in question was in Court, and *apparently* not claimed by the plaintiffs, *held* to have been proper for the Court to clear away any doubts by inquiring of the counsel for the plaintiffs at a subsequent stage of the trial, what disposition it was proposed to make of the note. *Lutz v. Yount*, 367.

3. In charging the jury the Judge inadvertently stated that an argument, which was then suggested by himself, had *come from the plaintiff's counsel; held* that the defendant had no cause to complain. *Ibid.*

4. Where a *lost letter* was one of many that had passed between a principal and his agent in reference to a matter of business and its contents were not precisely admitted: *Held* to be error for the Court to take upon itself to state its *effect* upon the relation between parties to the correspondence; and that in such case the Court, with proper observations on the law of agency, revocation, etc., should submit the question of *effect, etc., to the decision of the jury. Steed v. Smith*, 595.

See Criminal Proceeding, *passim.*

JUDGMENT.

1. An entry by a Clerk upon the Execution Docket in pursuance of a letter from the plaintiff's counsel, that no execution was to issue until ordered by such counsel, has no effect in preventing the judgment from becoming dormant. *Neely v. Craige*, 187.

2. The acts of February, 1863, c. 34, and of 1866, c. 50, suspending the Statute of Limitations, do not prevent judgments from becoming dormant. *Ibid.*

See Practice 1, 2, 5, 6, 14, 15, 19; Criminal Proceedings, 41.

JURISDICTION.

1. The *value* of a bond or note within the meaning of Rev. Code, c. 31, s. 38, is the principal and interest due on it. *Ausley v. Alderman*, 215.

2. When the value of a note is reduced by endorsed credits to less than $100, an action brought to the County or Superior

JURISDICTION—CONTINUED.

Court on such note, may be abated on plea of the defendant. *Ibid.*

3. Where there is a defect of jurisdiction as to the subject matter of a suit, the Court will stay its proceedings in the cause, however the defect may be made to appear. *Israel v. Ivey.* 551.

4. *Therefore,* where a suit was brought in the County Court upon a contract entered into before the 1st of May, 1865, and the date of the contract was made to appear by affidavit in the form of a plea to the jurisdiction; *held,* without deciding whether the plea was sufficient in form, that under the ordinance of June, 1866, the Court should dismiss, upon motion, or suggestion, or *ex mero motu.* *Ibid.*

5. In such case, upon appeal the Superior Court acquired jurisdiction only so far as to decide whether the judgment of the County Court was erroneous. *Ibid.*

6. The acts and the ordinance which have taken away from the County Courts jurisdiction over contracts entered into before May 1865 are not on that account unconstitutional. *State, etc., v. Barringer*, 554.

7. The order of Gen. Sickles, No. 10, does not restore that jurisdiction as regards minors suing upon guardian bonds, etc. *Ibid.*

See ATTACHMENT; SCIRE FACIAS.

JUSTICES OF THE PEACE.

See OFFICERS, 3.

KILLING—ACTION FOR WRONGFUL.

1. An action of Trespass, brought to recover damages for a death caused by a wrongful act (Rev. Code, c. 1, s. 9), does not abate by the death of the defendant. *Collier v. Arrington's Exrs.*, 356.

2. The damages in such an action are confined to the measure of the pecuniary injury caused by the killing, and are not intended as a *solatium* to the plaintiff, or as punishment to the defendant. *Ibid.*

LARCENY.

1. A took a bucket of peas to market and having occasion to go some distance to enquire the price of peas, set the bucket down in a cart which he mistook for that of a friend; the owner of the cart returning to it placed the bucket upon the ground, and afterwards being about to leave the market, raised it up and asked, "Whose are they?" whereupon B, a retailer of vegetables, came up and placed his hand upon the bucket, and then took it, the owner of the cart yielding it and saying, "You must give it up to the owner when he comes and calls for it;" afterward A found B with the bucket, beets and lettuce having been placed upon the peas, and B manifested insolence and unwillingness to surrender it: *Held* that there was evidence from which a jury might infer every ingredient of larceny. *State v. Farrow,* 161.

LARCENY—Continued.

2. A person may be indicted under Rev. Code, Ch. 34 s. 20, for stealing a National Bank note. *State v. Banks*, 577.

See Criminal Proceedings, 35, 42, 43; Indictment.

MARRIAGE.

1. It is competent for the Legislature by retrospective legislation to give validity to a marriage which is invalid by reason of the non-observance of some solemnity required by statute; *aliter* where such marriage is a *nullity*, as for want of consent, etc. *Cooke v. Cooke*, 583.
2. A marriage solemnized upon the 15th day of June, 1865, in Wake County, by one who during the existence of the Confederate government had been appointed a Justice of the Peace, is within the provisions of the ordinance of October 18, 1865, entitled, An ordinance declaring what laws and ordinances are in force, etc., and is rendered valid thereby. *Ibid.*

See Conflict of Laws.

MARRIAGE—BREACH OF PROMISE.

See Attachment, Original, 9.

MILITARY ORDERS.

1. The Military Order, No. 10, s. 2, (April 11, 1867,) does not forbid the Courts of the State to hear and try causes and render judgments and decrees; but it operates, in analogy to injunctions, against executions after judgment. *Broughton v. Haywood*, 380.

See Jurisdiction, 7; Chandler v. Holland, 598; State v. Sowls, 151.

MILLS, ETC.

1. Defendants have a right to *appeal* from an interlocutory order of the County Court appointing four freeholders to view, lay off and value land for a mill site under Rev. Code, c. 71, s. 1. *Minor v. Harris*, 322.
2. The rule upon this subject contained in the Revised Statutes, and administered in *Brooks v. Morgan*, 5 Ire. 481, has been reversed by the provisions of the Revised Code, c. 4, s. 1. *Ibid.*

NAME.

See Amendment, 3, 4.

NEGLIGENCE.

See Constable, 1.

NEGOTIABLE PAPER.

1. A note payable *at*, or *one day after* date, is not within the principle which *excepts* from the rule as to *bona fide* endorsees for value, *such* as take notes that are *overdue*. *Parker v. Stallings*, 590.
2. A *bona fide* endorsee for value of a note so payable obtains a good title against all previous parties, although when en-

NEGOTIABLE PAPER—Continued.

dorsed it was overdue, and had been obtained by a fraud upon some of those parties, committed by one through whom the endorsee claims title. *Ibid.*

See Construction.

NOTICE TO QUIT.

See Ejectment.

OFFICERS.

1. Persons licensed to trade under the revenue laws of the United States are not *officers* of the United States. *State v. Bell*, 76.
2. Public officers who have not taken the required oaths of office are not entitled to the salaries attached to such offices. *Wiley v. Worth*, 171.
3. The charter of a town requiring the officers to be *elected*, persons can not claim to be *de facto* officers of that town who have never been elected, but they are mere usurpers, and the corporation is not liable for contracts made by them in the name of the town. *Keeler v. New Bern*, 505.
4. Upon the Order of General Schofield (April 27, 1865,) announcing the subjugation of North Carolina, all persons who had been civil officers in the State ceased to be such *de facto* as well as *de jure*. *Cooke v. Cooke*, 583.

ORDINANCES.

See Constitution, 8; Crim. Proceedings, 36; Execution, 6, 7; Revenue, 1, 2.

ONUS PROBANDI.

See Crim. Proceedings, 23; Evidence, 30.

PARDON.

See Amnesty.

PARTITION.

See Devise, 5.

PARTNERSHIP.

See Dower, 2; Evidence, 3.

PERJURY.

Although one believes the allegation to which he testifies to be true, yet unless he has probable cause for such belief, he may be convicted of perjury. *State v. Knox*, 314.

PLEADING.

See Attachment, 3, 8; Criminal Proceedings, 21; Divorce, 1; Ejectment, 3; Jurisdiction, 2, 4.

PLEDGE.

Although for the validity of a pledge it is necessary that possession shall be given to the pledgee and not be resumed by the pledgor—this rule does not embrace a case where the pledge is re-delivered to the pledgor *as an agent of the pledgee*. *Rose v. Coble*, 517.

See Fraud.

INDEX.

PRACTICE.

1. An entry of the words "settled and dismissed, costs paid into office, received tax fee, J. L. H., A'tty," made by a plaintiff upon the appearance docket, before the return term of the writ, does not amount to a *retraxit;* and an order, at the return term, to strike out was proper. *Eagin v. Musgrove,* 13.

2. An entry upon the trial docket of the word "judg't,' made in the Superior Court, in open Court, and in accordance with its regular rules and practice, is an entry of *a regular judgment,* and can not be vacated at a subsequent term of the Court. *Davis v. Shaver,* 18.

3. What are the facts which accompany the making of such an entry, is a matter to be extracted from the evidence only by the Judge of the Court below, and his *finding* thereupon can not be reviewed by the Supreme Court. *Ibid.*

4. Where *error* does not *appear* upon the record transmitted to the Supreme Court, the judgment below must be affirmed. *Ibid.*

5. Distinctions between judgments, and entries thereof upon the records, stated by READE, J. *Ibid.*

6. A writ in debt had been returned to Fall Term, 1863, and counsel *marked his name* for the defendants, but entered no plea; at Fall Term, 1864, without the knowledge of the defendants, except M., (who was one of two administrators of the surety to the debt), and without the knowledge of their counsel, the counsel for the plaintiff signed "Judgment by default final for," etc.; at the next term (Spring, 1866,) the plaintiff's counsel agreed that the judgment might be stricken out as to all of the defendants excepting the administrators: *Held,* that there was no error in the refusal of the Judge below to strike out the judgment as to such administrators. *Sharpe v. Rintles,* 34.

7. A petition for a public road having been carried by appeal from the County to the Superior Court, the Judge made a decree in favor of the petitioners, *and thereupon ordered a procedendo to issue to the County Court: Held,* that although the latter part of this judgment was erroneous, and the Court should have ordered a writ to issue from its own office, yet, inasmuch as the parties had obeyed it, and carried the case back into the County Court, the petition was thereby *discontinued; and therefore* that after several years of other unsuccessful litigation in the cause had occurred in both Courts, the petitioners could not resort to the judgment above mentioned and move for an order to summon a jury to lay out the road. *Caldwell v. Parks,* 54.

8. After an attorney has been admitted by the Court to represent a party, he can not, unless with the consent of the Court, be discharged before the end of the suit. *Walton v. Sugg,* 98.

9. A suit does not end before complete satisfaction of, or discharge from, the judgment given therein. *Ibid.*

PRACTICE—Continued.

10. Where a deposition was found among the papers, with a commission unattached, and an envelope which appeared to have been sealed up and afterwards broken open: *Held* that this was sufficient evidence to justify the Clerk in finding that the deposition had been taken under such commission, and had been returned to him sealed up by the commissioner; and therefore that the Clerk had done right in passing upon and allowing such deposition to be read. *Hill v. Bell*, 122.

11. The stay law of September, 1861, under which a defendant was "not compelled to *plead* for twelve months from the return term," did not excuse him from entering an *appearance* at such return term, and then asking for time to plead. *Crawford v. Bank of Wilmington*, 136.

12. Illustration of the difference in the duty of the Court in cases where there is slight evidence, and in those where there is none. *State v. Sowls*, 151.

13. An affidavit amended by order of the Court must be re-sworn to after amendment, or it will be considered as no affidavit. *Atlantic Bank v. Frankford*, 199.

14. When a final judgment is rendered in the Supreme Court upon an appeal from a final judgment in the Superior Court, the latter Court has power to issue no other process in the case but an execution for its own costs. *Grissett v. Smith*, 297.

15. After verdict the defendant can not object that evidence was improperly admitted, if he did not except when it was introduced. *State v. Smith*, 302.

16. In an action sounding in damages, for an unliquidated money demand, a judgment by *default final* is irregular, and on motion will be set aside. *Moore v. Mitchell*, 304.

17. The rule, that words which, from the context, it is manifest have been omitted in a deed or a will may be supplied by construction, *held* to apply also in construing records. *State v. Martin*, 326.

18. *Therefore*, where a motion had been made by the defendant in the County Court to quash certain proceedings in bastardy, and a counter motion by the State, for a continuance; and the record proceeded thus, "thereupon the Court refused to quash, and continued the case to the next Superior Court of Law to be held, etc., etc., without surety by consent:" *Held* that the record showed sufficiently that the defendant had appealed from the decision upon the motion to quash, and therefore that the cause, upon being carried up, was properly constituted in the Superior Court. *Ibid.*

19. The provision of the 5th section of the ordinance entitled "An Ordinance to change the jurisdiction of the Courts," etc., in regard to the dismission of pending writs of *sci. fa.*, can not be taken advantage of without motion. *Kingsbury v. Hughes*, 328.

20. *Therefore*, where the defendant failed to make any defence to a *sci. fa.*, and thereupon judgment was given against him, *held* that such judgment was regular and valid. *Ibid.*

PRACTICE—Continued.

21. A vendee who enters into possession of land under a contract of purchase and afterwards fails to pay the price agreed upon, is not within the terms of the Rev. Code, c. 31, s. 48, which require *tenants* to give bond before pleading in ejectment. *Cox v. Gray*, 488.

22. The clerk of a County Court having transmitted to the Superior Court a case in which an appeal had been obtained by the plaintiff, *no appeal bond being filed by inadvertence: Held*, that upon such bond being filed in the Superior Court after a motion to dismiss for want thereof, it was probably competent for that court to refuse such motion—and that at all events, it was proper to grant an application for a *certiorari*, and then to place *the case* upon the trial docket. *Stickney v. Cox*, 495.

23. No evidence is required of facts *admitted* in a cause. *Keeler v. New Bern*, 505.

24. Where a *lost letter* was one of many that had passed between a principal and his agent in reference to a matter of business, and its contents were not precisely admitted: *Held* to be error for the court to take upon itself to state its *effect* upon the relation between the parties to the correspondence; and that in such case the court with proper observations on the law of agency, revocation, etc., should submit the question of *effect, etc., to the decision of the jury. Sneed v. Smith*, 595.

25. Costs awarded upon retaxation are virtually included in the original judgment in a cause. *Walton v. Sugg*, 98.

26. *Notice* of retaxation, if necessary at all, may be served upon an attorney in the suit to which the costs are claimed to be incident. *Ibid.*

See Amnesty, 1; Appeal; Assault; Bastardy, 2; Certiorari; Confessions, 2, 3; Constitution, 3; Crim. Proceedings; Debt, 2, 3; Evidence, 12; Executors, etc., 1, 2; Forcible Entry; Imprisonment for Debt; Judgment; Jurisdiction, 3, 4, 5.

PRESUMPTIONS.

See Appeal, 1, 2; Evidence, 13, 30.

PROCESS.

An attachment issued by the clerk of a court for a sum within the jurisdiction of the Court, and made returnable to the proper term of the Court, will not be dismissed for want of form, because directed "to any *Constable* or other lawful officers to execute and return within thirty days (Sundays excepted)," it appearing that it was executed by the *sheriff. Askew v. Stevenson*, 288.

See Amendment, 3, 5, 6, 7; Constable, 2; Corporation; Execution.

PUBLIC LAW.

1. The occupation during the late war of parts of the State by

PUBLIC LAW—Continued.

the forces of the United States can not be regarded as an occupation by a "public enemy." *State v. Bell*, 75.

2. A fictitious sale of a horse to prevent it from being impressed by the Confederate Government will not estop the owner from afterwards asserting his title thereto; and in such case, upon the vendee's claiming title to the horse, the vendor may bring suit without making a formal tender of the note which was one of the *forms* attending the sale. *Lutz v. Yount*, 367.
3. Address of Chase, C. J., to the bar attending the Circuit Court of the United States at June Term, 1867. 389.
4. Compulsory payment of a debt to a receiver under the Sequestration Acts of the Confederate Government, is no defence to a suit brought upon such debt by the creditor. *Shortridge v. Macon*, 392.
5. The suspension of intercourse consequent upon the recent war did not prevent interest from accruing between citizens adhering to the respective parties thereto. *Ibid.*
6. Discussion and statement of the principles, in regard to treason, etc., which affect the position of those who took part against the United States in the late war. *Ibid.*

See Officers, 1, 3.

PURCHASER FOR VALUE WITHOUT NOTICE.

A purchaser for value without notice, under a deed in trust in which some of the debts secured are fictitious, gets a good title even against the creditors of the fraudulent trustor. *McCorkle v. Earnhardt*, 300.

See Negotiable Paper.

RAPE.

1. The prisoner, a stranger to the prosecutrix who was a girl of between 13 and 14 years of age, had met her upon her way from a neighbor's, and offered to go home with her, a distance of less than a mile; his offer being accepted, he dismissed some children who had been acting as her guides: *Held*, that the girl's following him out of the road for a short distance into the woods; as also her not stopping upon her way home, after the alleged rape had been committed, to tell her aunt of it (she having passed the aunt's house and seen her)—did not warrant a prayer for a charge to the jury that the evidence of the prosecutrix should be disregarded altogether. *State v. Marshall*, 49.
2. For a conviction of rape, since the passage of the act of 1860-'1, c. 30, it is sufficient that the fact of penetration be established; and to establish such fact, it is not required, that the witness should use any particular form of words. *State v. Hodges*, 231.
3. The opinion of medical experts is admissible as to the age of a child upon whom the crime of "carnally knowing," etc., under the statute, Rev. Code, c. 34, s. 5, is charged. *State v. Smith*, 302.

RAPE—Continued.

4. An indictment under that statute need not charge that the prisoner *ravished* the child. *Ibid.*

RATIONAL DOUBT.

See Cartway; Crim. Proceedings, 20, 41; Divorce, 2; Practice 1—6, 16, 17.

REPLEVIN.

See Trover.

RETRAXIT.

See Practice, 1.

RETURN.

See Corporation; Certiorari.

REVENUE.

1. Under the ordinance of the 18th of October, 1865, concerning revenue, a provisional sheriff, *who had not given bond as required thereby,* was not authorized to demand of merchants an account of their purchases, and of the taxes due from them. *State v. Blagge,* 11.
2. The Ordinance of the 1st October, 1865, entitled "An ordinance to provide revenue," etc., in some sections operates retrospectively for the whole of that year; such operation is valid and binds persons even during such time within that year as they did business in places "within the Federal lines." *State v. Bell,* 75.
3. Except as restrained by the laws of the United States and the Constitution of the State, the taxing power of the State extends to all objects within its territory, and has no limitation except in the responsibility of the representative to his constituents. *Ibid.*
4. A tax upon the past business of the current year is not a "*a capitation tax.*" *Ibid.*
5. The 12th section of the Revenue Act of 1866, which imposes a tax of *fifteen* per cent upon spirituous liquors purchased by residents, of persons *not residing in the State,* and only *ten* per cent upon such as are purchased from the maker *in the State,* is constitutional. *Davis v. Dashiel,* 114.
6. The right of suing a sheriff to recover taxes that have been paid under protest, does not apply to taxes that have been collected by *virtue of a tax list. Huggins v. Hinson,* 126.
7. A tax list is of the nature of an execution. *Ibid.*
8. Distinction as to the above right in cases where the tax is collected by a sheriff without a list and with one, stated and explained. *Ibid.*
9. The only remedy for a person who has been improperly assessed by the list-taker is that provided under the Revenue Acts. *Ibid.*

See Constitution, 1, 2, 9, 10, 11, 13.

ROBBERY.

1. An ordinary railroad is not a public highway within the meaning of the Revised Code, c. 34, s. 2, punishing with death robbery in or near a public highway. *State v. Johnson*, 140.
2. The distinction between robbery and forcible trespass is, that in the former a *felonious* intention exists, and in the latter it does not. *State v. Sowls*, 151.
3. The question of felonious intention, is one for the jury, acting under such instructions from the court as each case may require. *Ibid.*
4. If, in March, 1865, one, who *bona fide* thought that he was acting under the orders of a Captain of the Home Guard, went to a dwelling house, and forcibly possessed himself of a sword, not for the purpose of appropriating it but solely to disarm the prosecutor; *held*, that it would not have been *robbery. Ibid.*
5. By PEARSON, C. J. Forcible trespass is the taking of the personal property of another by force; robbery, the *fraudulent* taking of the personal property of another by force. *Ibid.*

"SCALING."

See CONSTITUTION, 17; GUARANTY.

SCIRE FACIAS.

1. A writ of *scire facias* upon a judgment in a County Court, notwithstanding the Stay Law of September, 1861, will not lie except *in the court in which the judgment is. Griffis v. McNeill*, 175.
2. Where a writ of *scire facias* upon a judgment in a County Court had been brought to a Superior Court, *held* that, notwithstanding the Stay Law of the Convention of 1866, it should be dismissed at the costs *of the plaintiff. Ibid.*
3. The Ordinance of the Convention of June, 1866, entitled "An Ordinance to change the jurisdiction of the courts and the rules of pleading therein," is general, and applies to writs of *sci. fa.* from the Supreme Court as well as those from the County and Superior Courts. *Bingham v. Richardson*, 315.

See CONSTITUTION, 18; EXECUTION, 7, 8; PRACTICE, 18, 19.

SETTLEMENT.

See APPRENTICE, 1; BASTARDY, 3.

SHERIFF.

See ACTION, 3; EXECUTION, 1; REVENUE 1, 6.

STATUTES.

1. An act incorporating a ferry or toll-bridge, is a Private act: *Carrow v. Bridge Co.*, 118.
2. *Therefore*, the court can not take judicial notice of the act of December, 1866, which amends the charter of the Washington Toll-Bridge Company. *Ibid.*

STATUTES—CONTINUED.

3. That construction of a statute which attributes to the Legislature the exercise of a doubtful power, will not, in the absence of direct words, be readily adopted. *Mardre v. Felton*, 279.

4. The Raleigh and Gaston Railroad Company did not incur the penalties imposed by the Rev. Code, c. 101, s. 30, by transporting its passengers and freight *in boats* across the Roanoke at Gaston, during the time that there was no bridge at that point, in consequence of its having been burned by the military in 1865. *Pugh v. R. R.*, 359.

5. If, pending an appeal in a criminal case, the statute authorizing the indictment is repealed, judgment will be arrested. *State v. Nutt*, 20.

See AMNESTY; COST, 9—12, 19—21; CRIMINAL PROCEEDINGS, 40; MARRIAGE, 1; REVENUE, 5—9.

STATUTE OF FRAUDS.

1. An auctioneer is the agent of both seller and purchaser. Therefore, upon a tract of land being bid off at auction by one who is present, the auctioneer is his agent for the purpose of directing his name to be signed to an agreement to purchase. *Cherry v. Long*, 466.

2. A memorandum by the clerk of the auctioneer "Rayner Tract to James S.Long at $40 per acre," by order of the auctioneer, in a case where it was shown that the expression "Rayner Tract" was a well-known designation, *held*, under the circumstances, to be sufficient, within the statute of frauds. *Ibid.*

STATUTE OF LIMITATIONS.

See ABATEMENT, 3; JUDGMENT, 2.

TENANCY.

See EJECTMENT.

TITLE.

1. The rule that, in controversies between titles of different dates which lap, *actual possession of the lappage* is required to perfect the color of title of the junior claimant, applies to controversies between the State and citizens who claim under mesne conveyances which extend the boundaries of the original grant. *Hedrick v. Gobble*, 348.

2. If the person who claims under the elder title have no actual possession of a *lappage*, such possession, although for a part only, by him who has the junior title, continued for seven years, will confer a valid title for the whole. *Kerr v. Elliott*, 601.

TRESPASS.

1. Where a ditch formed the boundary between the lands of the plaintiff and those of A B, and an obstruction had been placed therein by the plaintiff with the consent of A B, in order to prevent sand from being carried down and choking a ditch of his own; *held* that *trespass* was not the proper

TRESPASS—Continued.

form of action to redress an injury (the choking of the plaintiff's ditch) caused by the defendant's removing so much of such obstruction as was upon A B's half of the boundary ditch—the latter having consented to such removal. *Hogwood v. Edwards*, 350.

2. Two neighbors having agreed to build a rail fence upon the boundary between them, it was also agreed that the eastern half of it should be built by the plaintiff and the western by the defendant. In building his part the defendant, inadvertently, or to get a better location, placed it altogether upon the plaintiff's land: *Held* that he was not liable to the plaintiff *in an action of trespass quare clausum fregit*, for subsequently removing his part of such fence. *Whitfield v. Bodenhammer*, 362.

3. *Held*, also, that neither the agreement between the parties about the building of the fence, nor a subsequent notice given by the defendant to the plaintiff of his intention to remove it, were (under the circumstances) evidence of license of a removal by the plaintiff. *Ibid.*

See Arbitration and Award, 1; Killing—Action For.

TROVER.

1. Possession of a chattel by one who holds *for himself*, in respect to either a general or a special property, will support *replevin* or *trover;* such possession *for another* will not support an action; *therefore*,

2. Where the plaintiff took possession of a steamboat which had been sold to him by a sheriff with the understanding that if the sale was not valid he should be bailee for the sheriff: *Held* that he had title sufficient to maintain *replevin*. *Scott v. Elliott*, 104.

3. Where two persons claimed a mule adversely to each other, *held* that the fact that the defendant prevailed upon the plaintiff to give it into *his* possession by making an affidavit that it was his, and then put it at work, did not constitute a conversion: *also*, that when, a few days afterwards, the plaintiff went to the defendant and insisted upon the mule being delivered back, and it was agreed between the parties that they should meet on a day fixed and settle the question, the plaintiff could not without a demand bring an action of trover for the mule *before* such day. Whether he could have done so after a demand *quaere*. *Finch v. Clarke*, 335.

4. Where the owner of a slave hired her out for the year 1865 for a share of the crop, and such share was delivered to him: *Held* that no question as to the rights of the slave to the product of her labor after emancipation, could be raised in defence to an action of trover brought by the owner against persons who, claiming under a sale from the slave, *converted* the share so set apart. *Chandler v. Holland*, 598.

VENDOR AND VENDEE.

See Ejectment; Emblements.

VERDICT.

See Crim. Proceedings, 3, 4, 41, 46.

WARRANTY.

1. A bill of sale in the following words: Received of M. & H. $2,000 for a negro boy named Allen, 26 years old, said negro is warranted sound in mind and in body and the title good, *held* to contain no warranty as to age. *March v. Phelps*, 560.

WILL.

1. That a paper-writing, propounded as a will, has upon it an attestation clause unwitnessed, will not prevent its being established as a holograph. *Hill v. Bell*, 122.
2. The placing of a holograph in a trunk, left for safekeeping with a friend and having in it the larger part of the valuable papers and money of the deceased, will satisfy the requirements of the statute upon the question of deposit. *Ibid.*
3. Certain letters of a testamentary character, written and signed by the testator, dealing with property contained in the principal paper propounded, and referred to therein as giving further directions, having been rejected from probate: *Held* that such rejection did not in the view of a court of probate render such principal paper *"unfinished," and void. Wood v. Sawyer*, 251.
4. When a paper-writing, purporting to be a will and executed with the requisite formalities by a person competent to make a will, is offered for probate, it must be established without regard to the construction of its contents, and without consideration of any trusts declared therein, or resulting to the heir. *Ibid.*

WITNESS.

1. In order to confirm the evidence of a witness, it is competent to ask whether it does not concur with statements previously made by the witness, out of court. *State v. Marshall*, 49.
2. The husband of one charged as an accessory is not a competent witness in favor of one charged as the principal felon. *State v. Ludwick*, 401.
3. Where two or more persons are on trial under one *indictment* for the same offence they are, by the act of 1866, c. 43, competent and compellable to give evidence for or against each other, though one of them can not be a witness for or against himself, or for or against his wife (and *e converso*), and is not compellable to answer any question tending to criminate himself. *State v. Rose*, 406.
4. A freed woman is a competent witness against a freed man who claimed her as his wife while they were slaves, but since their emancipation has refused to marry her. *State v. Taylor* and *Knight*, 508.

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